No. 82-1509

IN THE

Supreme Court of the United States

October Term, 1982

DELEET MERCHANDISING CORP.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented.

Does the Government have the right in perpetuity to seek to assess tax deficiency and penalties, or does the filing of a complete and accurate amended income tax return after the taxpayer filed an original tax return which, it is alleged, fraudulently omitted certain taxable income, start the running of the three-year Statute of Limitations under Section 6501(a) of the Internal Revenue Code?

With the singular exception of the divided Third Circuit every other Federal court which has entertained the question raised has held that the three year Statute of Limitations is applicable.

Table of Contents.

Index to Appendix.

Page

TABLE OF AUTHORITIES.

CASES CITED:

No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petition for a Writ of Certiorari.

Petitioner Deleet Merchandising Corp. ("Deleet"), respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinion Below.

The Opinion of the Court of Appeals for the Third Circuit (App. *infra*, p. 1a) is reported at 693 F. 2d 298 (3rd

Cir. 1982). The Opinion of the United States District Court for the District of New Jersey (App. p. 1d) is reported at 535 F. Supp. 402 (1982).

Jurisdiction.

The judgment of the Court of Appeals for the Third Circuit (App. p. 1b) was entered on November 29, 1982. A petition for rehearing and for rehearing *en banc* was denied on December 23, 1982 (App. p. 1c). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statute Involved.

Section 6501 of the Internal Revenue Code of 1954, as amended ("the Code"), in pertinent part provides:

> §6501 (a) GENERAL RULE—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * * and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
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> * * *
>
> (c) EXCEPTIONS—
>
> (1) FALSE RETURN—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) NO RETURN—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Statement of the Case.

A. Procedural History

On January 4, 1980, the petitioner, Deleet Merchandising Corp. (the "Taxpayer") commenced this action by filing a complaint in the United States District Court for the District of New Jersey. The complaint alleged that the Internal Revenue Service (the "Service") erroneously and illegally assessed the Taxpayer for corporate income taxes and penalties totalling $38,604.00 for 1967 and $75,589.83 for 1968, and demanded judgment in those amounts, with interest as provided by law. On March 21, 1980, the Government filed its answer, which denied that the assessments were erroneous or illegal.

On December 14, 1981, the Taxpayer moved for Summary Judgment, on the ground that the assessment of tax by the Service was time barred under the three year limitation in Section 6501(a) of the Code. The Government opposed on the ground that since the original returns were

allegedly fraudulent[1] the Government is entitled to assess the Taxpayer indefinitely, under Section 6501(c)(1) of the Code.

By opinion and order dated and entered December 22, 1981, Chief Judge Clarkson Fisher granted Summary Judgment in favor of the Taxpayer, holding that the Taxpayer's filing in 1973 of concededly complete, accurate and non-fraudulent amended income tax returns for the tax years 1967 and 1968 commenced the running of the three-year limitations period under Section 6501(a) of the Code and, therefore, the assessment of a tax deficiency and penalties in 1979, more than six years later, was time barred.

On February 18, 1982, the Government filed its Notice of Appeal to the United States Court of Appeals for the Third Circuit. On November 29, 1982, the Court of Appeals (Circuit Judge James Hunter III dissenting), disregarding the opinions of the United States Courts of Appeal for the Tenth and Second Circuits and the full United States Tax Court[2] concluded that the Government had a right in perpetuity to assess the taxpayer under Section 6501(c)(1) of the Code. Petition for rehearing *en banc* was denied by the Court of Appeals on December 23, 1982, and this Petition followed.

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[1] The Government's allegation that the original returns were fraudulent has never been adjudicated. The District Court noted that the fraudulent or nonfraudulent nature of those returns did not present a genuine issue of fact, and had no bearing on the outcome of the motion.

[2] *Dowell v. Commissioner*, 614 F. 2d 1263 (10th Cir. 1980); *Britton v. United States*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without published opinion* (2nd Cir. No. 816246 April 15, 1982); *Klemp v. Commissioner*, 77 T. C. 201 (1981); *Espinoza v. Commissioner*, 78 T. C. 412 (1982); *Kramer v. Commissioner*, 44 T. C. M. 42 (1982); *Elliot Liroff v. Commissioner*, 44 T. C. M. 42 (1982); *Derfel v. Commissioner*, 44 T. C. M. 47 (1982); *Nesmith v. Commissioner*, 42 T. C. M. 1269 (1981).

B. Relevant Facts

There are no facts in dispute in connection with this matter.[3] It is agreed that the Taxpayer timely filed its corporation income tax returns for the years ending December 31, 1967 and December 31, 1968 (the "original returns") and paid the taxes due on these returns. Further, it is undisputed that on August 9, 1973 the Taxpayer, which was not the subject of any criminal or civil government investigation, voluntarily filed amended tax returns for the tax years 1967 and 1968 (the "amended returns"). The amended returns were accepted for filing by the government, who conceded them to be accurate. Pursuant to its amended returns the Taxpayer sought a refund of $6,206.00 shown to be due on the 1967 amended return and paid $36,314.01 due to the Service as additional taxes on the 1968 amended return.

On December 14, 1979, more than six years after the amended returns were filed, the Service issued a Notice of Deficiency, based upon the information contained in Taxpayer's amended return. The Notice of Deficiency, *inter alia*, disallowed Taxpayer's refund claim for 1967, and assessed a deficiency of $25,248.00 and penalties of $13,356.00 for 1967, and assessed a deficiency of $36,314.01 and penalties of $39,275.82 for 1968. On or about December 27, 1979, the Taxpayer paid the deficiencies and penalties assessed. On January 4, 1980, the Taxpayer filed its complaint in the United States District Court for the District of New Jersey, seeking judgment for the amounts improperly, erroneously and illegally assessed by the Service.

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[3] The Government submitted no affidavits or documentation to the District Court in opposition to the Taxpayer's motion for Summary Judgment. Thus, all facts in the Taxpayer's affidavit submitted below were accepted as stated.

Reason for Granting a Writ of Certiorari

I.

The decision below is in direct conflict with the decisions of the Courts of Appeals for the Tenth Circuit and the Second Circuit and the United States Tax Court.

There exists at present a direct conflict between the decisions rendered by the Courts of Appeals for the Tenth Circuit and the Second Circuit and the Tax Court of the United States[4] and the decision rendered by the Court of Appeals for the Third Circuit. On appeal by the Government two other Circuit Courts (the Fifth Circuit and the Ninth Circuit) are now considering cases involving the same issues of law.[5] The conflict between the Circuit Courts will therefore be further heightened by the decisions of two other Circuit Courts, which will either align themselves with the view of the majority, rejecting the position expressed by the Third Circuit, or join that minority position. Therefore, if this Petition is not granted by the Court, the Court will certainly have to consider numerous like petitions filed by the Government or the Taxpayer each time this important issue is decided by one of the Circuit Courts of Appeals.

Moreover, the issue of the applicability of the Statute of Limitations is of such significance to the uniform application and enforcement of the Federal tax laws that the Government has informally advised the attorneys for the

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[4] See cases cited in footnote 2 *supra* at p. 4.

[5] *Klemp v. Commissioner*, 77 T. C. 201 (1981), *appeal docketed*, No. 81-7744 (9th Cir.); *Nesmith v. Commissioner*, 42 T. C. M. 1269 (1981), *appeal docketed*. No. 82-4162 (5th Cir.).

Petitioner that they will not oppose the instant petition and may in all likelihood join in the request for the granting of a Writ of Certiorari. Petitioner submits that the substantial interest of the Government, as well as that of the taxpayers, in having this issue resolved by this Court is ample evidence that the most economic use of judicial resources would be the granting of the instant application. A timely decision by this Court will eliminate the barrage of appeals which would doubtless otherwise be filed in the Tax Court and the various Circuit Courts of Appeals, as well as eliminate the filing with this Court of numerous Certiorari petitions by either a concerned Government or interested taxpayers.

The basic conflict between the majority view and that of the Third Circuit arises from the majority's conclusion that there is no basis for drawing a legal distinction between those cases involving a fraudulent failure to file a tax return [Section 6501(c)(3)] and those involving filing a false tax return [Section 6501(c)(1)]. The majority views the filing of a non-fraudulent amended return subsequent to the filing of a false and fraudulent original return in exactly the same light as filing a late original return following the fraudulent failure to file any return at all; to wit, the filing of the amended return commences the running of the three year Statute of Limitations provided in Section 6501(a) of the Code. The majority position is based upon the decision in *Bennett v. Commissioner,* 30 T. C. 114 (1958), acq. 1958-2 C. B. 3, and this Court's decision in *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172 (1934) as to what constitutes the filing of a proper tax return.

The minority view, expressed by a divided Third Circuit, rejected the reasoning of the majority and concluded—without reference to any legislative history—that Congress intended to draw a distinction between a fraudulent failure to file a return and the filing of a false

return. It holds that once a fraudulent tax return has been filed, the Statute of Limitations is tolled forever and no subsequent act, by either the Government or the taxpayer, can deprive the Government of its perpetual right to assess civil penalties.

The opinions of the majority of the Circuit Courts and the Tax Court are on firmer legal ground and are better reasoned than the opinion of the Third Circuit, as is pointed out in the dissenting opinion filed by Judge Hunter of the Third Circuit. Moreover, by creating a clear disparity of treatment between the fraudulent failure to file and the filing of a fraudulent tax return, the Third Circuit has not only elevated one form of tax fraud over the other, but in doing so, has ignored this Court's opinion in *Zellerbach Paper Company v. Helvering, supra*; the governing decision of *Bennett v. Commissioner, supra*, and the Service's stated view of the applicable law, as manifested by its own Revenue Ruling issued subsequent to *Bennett*

The Tax Court in *Bennett* held that where a taxpayer fails to file a tax return, he is open to assessment at literally any time under Section 6501(c) (3). However, once that failure is corrected by the filing of a proper and accurate return, the provisions of Section 6501(a) supersede the provisions of Section 6501(c) (3) and the assessment period is thereby limited to three years from the date of the filing of the proper and accurate return. Following its acquiescence in *Bennett*, the Service issued a Revenue Ruling (Rev. Rul. 79-178 I.R.B. 1979-23, 16) stating that:

> "The tax cannot be assessed at any time under Section 6501(c) of the Code, but must be assessed within the three-year period of limitations provided in Section 6501(a) (June 1, 1979)."

In its ruling the Service refers to Section 6501(c) *in toto* without reference to its various sub-sections. Thus, in promulgating its Ruling, the Service made no attempt to distinguish between the fraudulent failure to file [Section 6501(c) (3)] and the filing of a fraudulent return [Section 6501(c) (1)].

The majority of the Federal Courts which have considered this issue have also rejected creation of an artificial distinction between these two Sections of the Code. These Courts have held that as the filing of a late return begins the running of the limitation period where the taxpayer has fraudulently failed to file, so the filing of a proper and accurate amended return begins the running of the limitation period with respect to the taxpayer who previously filed a fraudulent return. In reaching their conclusions, the majority have relied on this Court's opinion in *Zellerbach Paper Company v. Helvering, supra,* which held that a proper tax return must "evidence an honest and genuine effort at reporting the information and comply with the law." A false and fraudulent return does not satisfy such a disclosure requirement and will not suffice to trigger the three year period of limitations set forth in Section 6501(a) of the Code. The filing of a complete and accurate amended return begins the running of the three-year Statute of Limitations set forth in Section 6501(a), for it does represent an "honest and genuine effort" on the part of the taxpayer to comply with the legal requirements of the Code, and it must be viewed as a "return" under all applicable Sections of the Code.

The Third Circuit decision, disregarding the prior decisions of the Second and Tenth Circuits, and drawing a distinction as to the applicability of the three-year Statute of Limitations between those cases involving fraudulent

failure to file and those involving fraudulent filing, is erroneous and contrary to public policy. First, by giving preferential treatment to the fraudulent non-filer it clearly elevates one form of tax fraud over another. Moreover, it discourages those who may have originally filed a false return from coming forth, confessing their error and filing a proper return.

It has often been stated that the American system of taxation depends upon self-assessment by informing the Government of accurate tax liability. *See,* 9 Mertens, *Law of Federal Income Taxation,* §49.02; *Lucia v. The United States,* 474 F. 2d 565 (5th Cir. 1973). Under the erroneous holding of the Third Circuit proper self-assessment is discouraged.

The potential ramifications of the Third Circuit holding can be clarified by use of a hypothetical situation:

New management of a corporation determines that prior management, had, some six years before, filed a fraudulent tax return. Under the impact of the Third Circuit decision, new management could conclude that it would not be in the best interests of the corporation to consider rectifying the situation by filing a complete and accurate amended tax return, for with the six year Statute of Limitations on Criminal Tax Fraud having run (Section 6531 of the Code), beyond its willingness and desire to file a proper and accurate tax return, the management must concern itself with the question of exposing the corporation to the imposition of additional tax assessments and civil penalties. Certainly the filing of such an amended tax return by the corporation would alert the Service to the fact that the first return was improper. Thereafter, if deprived of the benefit of any Statute of Limitations, the corporation's voluntary filing of an accurate amended

return would subject it to the pleasure of the Service, which could impose tax assessments and civil penalties upon the corporation at any time it so desired, until the last day of the corporation's existence.

Acceptance of such a policy discourages the conscientious and repentant taxpayer who might desire to correct errors made in the original return from coming forth and supplying the government with the proper information by way of an amended return. It thereby creates an obstacle to honesty in dealing with the Government. *See, National Refining Company of Ohio v. Commissioner,* 1 B.T.A. 236, 241 (1924), nonacq., IV-1 C.B.4. Thus, the erroneous ruling by the Third Circuit must be viewed as generally detrimental to the overall policies applicable to tax collection in this country.

The conflict inevitably ensuing from a divided Third Circuit's rejection of the prior decisions of the Tenth and Second Circuits and the full Tax Court will result—and in this case has already resulted—in the creation of a substantial disparity with respect to the application and enforcement of the Federal tax laws. The impact of this disparity of application can best be demonstrated by a simple review of the effect of the Third Circuit's decision on the circumstances in this case, which is, in fact, a microcosm of the effect this conflict between the Circuit Courts of Appeals will have on all taxpayers.

The Petitioner, Deleet Merchandising Corp., as a corporation brought its claims against the Commissioner of Internal Revenue in the U.S. District Court. Companion cases were filed in the Tax Court by the former and present officers of Deleet, and relief similar to that granted

the individual taxpayers by the Tax Court.[6] Based upon the opinion in the Third Circuit reversing the holding of the U.S. District Court as to the applicability of the Statute of Limitations, the Government made motions in the Tax Court to vacate the prior Tax Court judgments granted to the individual taxpayers. After filing their motions in all of the cases, the Government, realizing that one of the taxpayers resided in the State of New York and thus within the jurisdiction of the Second Circuit and not the Third Circuit, withdrew its motion to vacate the prior judgment with respect to that taxpayer.[7] Therefore, this very case presents a situation where one taxpayer, a former officer of the Petitioning corporation, is protected by the Second Circuit ruling that the tax must be assessed within the three-year Statute of Limitations provided in Section 6501(a); while three other taxpayers, also officers of the Petitioner Deleet, whose tax liability arose from the identical factual circumstances as the New York taxpayer, are deprived of the protection of the application of the Statute of Limitations merely by reason of the fact taht they live within the jurisdiction of the Third Circuit. Petitioner suggests that this harsh and inequitable result is not in keeping with the concept of "equal protection" which our judicial system is intended to afford to all citizens and taxpayers of this Country.

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[6] *Kramer v. Commissioner*, 44 T.C.M. 42 (1982); *Elliot Liroff v. Commissioner*, 44 T.C.M. 42 (1982); *Derfel v. Commissioner*, 44 T.C.M. 45 (1982); *Richard Liroff v. Commissioner*, 44 T.C.M. 47 (1982).

[7] *Elliot Liroff v. Commissioner*, Doc. #3219-80—Order dated February 4, 1983 (see, App. p. 1f).

II.

The decision below presents a substantial question of statutory interpretation.

A divided Third Circuit, in reaching its decision, rejected the interpretation of the statutes by the other Federal Circuit Courts as well as all prior judicial statements of Congressional intent in the area. The Court affirmatively found that Congress clearly intended to draw a distinction between the "fraudulent failure to file" [Section 6501(c)(3)] and the "filing of a fraudulent tax return" [Section 6501(c)(1)]; this Congressional distinction, as stated the Third Circuit, without citing any supporting authority or legislative history, permits an open-ended assessment of civil penalties notwithstanding the subsequent filing of a complete and accurate amended return.

Petitioner submits that the Third Circuit's strained reading of the statute is contrary to this Court's consistent holding that, in all cases of statutory construction, it is the judiciary's task to interpret the words of the statute in light of the purposes Congress has sought to serve. *Chapman v. Houston Welfare Rights Org.*, 441 U. S. 600, 608 (1979). Furthermore, said interpretation is in direct conflict with available legislative history.

Congressional intent that the assessment and collection of Federal income tax be carried out within a period of limitations, measured from the date of the filing of the income tax return, is expressly set forth in the statute [Section 6501(a)]. Moreover, it was established long ago that,

> "Statutes of limitation are founded on sound policy. They are statutes of repose and should not

> be evaded by a forced construction." *Pillow v. Roberts,* 13 How. 472, 477 (1851). *See also Clementson v. Williams,* 8 Cranch 72, 74 (1814).

In the Federal tax area, there has been no manifestation of Congressional intent of a policy in favor of an unlimited assessment period. *Bennett v. Commissioner,* 30 T. C. 114, 123-24 (1958). Once a taxpayer has furnished the Government with a complete and accurate return, Congress has given the Government a definite period within which to determine any errors; after that period the taxpayer is assured his tax liability cannot be reopened. *Germantown Trust Co. v. Commissioner,* 309 U. S. 304 (1940); *Mabel Elevator Co. v. Commissioner,* 2 B.T.A. 517, 519 (1925), acq., VI-1 C.B. 4.

> "These matters Congress has considered and in its legislative wisdom it has enacted the limitation period at the price of losing the tax." *Sugar Creek Coal & Mining Co. v. Commissioner,* 31 B.T.A. 344, 347 (1934), acq., XIV-1 C.B. 20.

The only instances in which the limitations period is lengthened or altogether suspended are those in which the Government has not received within the three year period the information it requires to investigate tax liabilities. 26 U.S.C. §§ 6501(c) and 6501(e); *see United States v. National Tank & Export Co.,* 45 F. 2d 1005 (5th Cir. 1930), *cert. denied,* 283 U. S. 839 (1931); *cf. The Colony, Inc. v. Commissioner,* 357 U. S. 28 (1958). *See also* "Statutes of Limitation in Tax Fraud: Basic Policies and Circumvention" 71 Dickinson L. Rev. 1 (1966). Once the Government does receive the information it requires, *i.e.*, once a

proper return is filed, there is no reason why its investigation period should thereafter be unlimited. For an open-ended Statute of Limitations cannot be said to serve Congress' intent or the purpose of the society it is intended to serve.[8]

Moreover, the statutory provisions regarding the filing of a fraudulent return and the failure to file a return are identical in language and have confluent legislative histories; therefore, they should be given identical judicial interpretations. The Revenue Act of 1918 provided an unlimited assessment period for fraudulent returns. The Revenue Act of 1921 added failure to file cases to those covered by the unlimited assessment provision, so that both the fraudulent filing and the fraudulent failure to file circumstances were addressed within the same subsection, Section 250(d). *See* 10 Mertens, *Law of Federal Income Taxation* (1976 ed.), §§ 57.09 and 57.10; *Seidman's Legislative History of Federal Income Tax Laws, 1938-1961*, pp. 880-882. Both circumstances continued to be treated within a single subsection, Section 276(a), in the

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[8]In construing the statute the Third Circuit also accepted the Service's erroneous contention that the Internal Revenue Code provides no authority for the filing of amended returns. This ostrich-like position ignores the fact that the filing of amended returns is a well-recognized, commonplace practice encouraged by the Commissioner. *See, Brookwalter v. Mayer*, 345 F. 2d 476, 480 (8th Cir. 1965). In fact, forms for an "Amended U.S. Corporate Income Tax Return" are printed by the Commissioner as Form 1120X. The purpose of Form 1120X as stated thereon is "to correct corporate income tax returns, Form 1120, as you originally filed it or as it was later adjusted by an amended return, claim for refund or an exemption." Form 1120X is to be filed "only after you have filed your original return. Generally, you must file Form 1120X within three years after the date the original return was due or three years after the date you filed it, whichever was later." General Instructions to Form 1120X; *See* Treas. Reg. §301.6402-3(a) (1) and (2); *See also* Treas. Reg. §1.6091-2(e).

Internal Revenue Code of 1939. When the Internal Revenue Code of 1954 was adopted, the Congressional draftsmen, without explanation, placed the two circumstances, unchanged, in separate subsections, Sections 6501(c) (1) and 6501(c) (3). The legislative history provides no hint of any intention to differentiate between those who fraudulently fail to file returns and those who file fraudulent returns. Indeed, both subsections, though set apart, still provide identical treatment: "[t]he tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

A unified and consistent interpretation of this Federal statute should be promulgated. Therefore, this application should be granted by this Court, to provide a speedy resolution of the conflict of statutory interpretations regarding the extent of the application of Section 6501(a) which presently exists between the Circuit Courts of Appeals.

III.

The decision below created an inherently inequitable situation with national implications affecting the public interest.

The issue presented in this Petition relates to the interpretation of a statute of national importance—the Federal tax law—which should be uniformly applied. The decision of a divided Third Circuit to totally disregard the prior decisions of its sister Circuit Courts and that of the full Tax Court, has created a situation where taxpayers are subject to the imposition of substantial adverse tax consequence based solely upon their geographical residence within the United States.

As heretofore noted, as a result of the conflict between the Circuits, in the instant case taxpaying officers of the Petitioner Deleet will themselves receive different and conflicting treatment under the Federal tax laws: One taxpayer will be protected, by virtue of the three-year Statute of Limitations, from any attempt by the Internal Revenue Service to impose any additional assessments and civil penalties on him, while the other taxpaying officers will be subject to additional assessments and penalties, notwithstanding the fact that the Government waited over six years after a proper and accurate return was filed to seek such assessments and penalties. This disparity of treatment results solely from the conflicting decisions of the Second and Third Circuit Courts, which has caused the Federal tax laws to be applied based upon a determination as to which bank of the Hudson River the taxpayer resides—the taxpayer living on the New York side of the Hudson receiving more favorable treatment than the taxpayers residing on the New Jersey side.

This disparity of treatment, although highlighted by the facts herein, is not limited to the case at bar, but rather is applicable to all taxpayers who reside within the jurisdictional boundaries of the Third Circuit contrasted with those who live in the Tenth and Second Circuits and beyond. Moreover, how this aspect of Federal tax law will be applied to those taxpayers residing within the Fifth and Ninth Circuits is still uncertain, for in those jurisdictions the cases which have been argued to those Appellate Courts have not yet been decided.

The applicability of the civil Statute of Limitations in the area of Federal tax law should not be determined solely by the geographical location of the taxpayer's place of residence. Nor should the application of the Statute of

Limitations vary from tax year to tax year, merely by reason of the fact that the taxpayer may have moved from one area of the country to another. However, unless this Court considers and rules on this matter such inequities in the administration of Federal tax law will continue unabated.

The absence of an orderly and equitable administration of Federal tax law is not in keeping with the professed goals of this Nation's Judicial System, which prides itself on affording "equal protection under the law" to all of its citizens and taxpayers. Petitioner therefore submits that this Court should grant this petition for a Writ of Certiorari so that all Federal taxpayers are guaranteed continued uniformity of application of the Federal tax laws.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted. The Court may consider the error below so clear as to justify reversal without the filing of further briefs and oral argument.

Respectfully submitted,

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APPENDIX A—Opinion of the Third Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-3033 and 82-5171

ERNEST BADARACCO, SR. and ROSE BADARACCO,
ERNEST BADARACCO, JR. and
BARBARA BADARACCO,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellant in No. 81-3033

ON APPEAL FROM THE UNITED STATES TAX COURT

Docket Entries Nos. 1700-78 and 1701-78

DELEET MERCHANDISING CORP.

v.

UNITED STATES OF AMERICA,
Appellant in No. 82-5171

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 80-00026

Argued September 16, 1982

Before: ADAMS, HUNTER and BECKER, *Circuit Judges*

(Filed November 29, 1982)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*,

These two appeals[1] concern the effect of filing nonfraudulent, amended income tax returns, subsequent to the filing of fraudulent original returns, on the statute of limitations provisions of 26 U.S.C. §6501.[2]

I.

The facts in each proceeding are undisputed.[3] In the first case, Ernest Badaracco, Sr. and Ernest Badaracco, Jr. were equal partners in an electrical contracting business, Badaracco Brothers and Company. They

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1. These cases were not consolidated. They were, however, argued together and contain no relevant differences of fact. We will, therefore, discuss them in a single opinion.

2. 26 U.S.C. §6501 provides in relevant part:

> (a) Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
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> . . .
>
> (c) Exceptions.
>
> (1) False return. In the case of a false return or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

3. Delcet Merchandising Corporation denies any fraud on its part in the preparation of its income tax returns. The district court, however, assumed that the original returns were fraudulent for the purposes of the summary judgment motion, and we must make the same assumption in deciding the appeal from that decision.

filed individual and partnership returns for the years 1965 to 1969, which fraudulently understated their taxable income. After federal grand juries subpoenaed the partnership's books and records, the taxpayers, on August 17, 1971, filed amended returns for each of the years in question. Three months later, on November 17, 1971, the Badaraccos were indicted on fifteen counts under 26 U.S.C. §7206(1) for filing false and fraudulent income tax returns for the years 1965 to 1969. They each entered a plea of guilty to the charge of filing a false and fraudulent partnership tax return for 1967, and the district court entered a judgment of conviction on June 6, 1973. *United States v. Badaracco*, (N.J. Crim. No. 766-71). The remaining counts of the indictment were dismissed. Four and one-half years after the conviction, the Commissioner of Internal Revenue issued deficiency notices for each of the five years in question. The Badaraccos asserted that the Commissioner's action was time-barred by 26 U.S.C. §6501(a), because more than three years had passed since the filing of their non-fraudulent, amended returns. The Tax Court agreed, and the Commissioner appealed to this Court.

In the second case, Deleet Merchandising Corporation ("Deleet") filed timely corporate income tax returns for the years 1967 and 1968. Amended returns for these years were then filed on August 9, 1973. Following lengthy criminal and civil investigations, the Internal Revenue Service ("I.R.S.") issued a notice of deficiency to Deleet on December 14, 1979 for the years 1967 and 1968. The taxpayer paid the deficiencies and penalties assessed on or about December 27, 1979, and then filed a complaint in district court to recover those monies. On December 14, 1981, Deleet moved for summary judgment on the ground that even if the original returns had been fraudulent, the deficiencies and penalties could not be assessed more than three years after the filing of a non-fraudulent amended return. The district court granted the motion and the Commissioner appealed.

II.

To support their claims that the three year statute of limitations has run, the taxpayers rely principally on *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and the cases which have followed it. *Britton v. U.S.*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion* (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744); *see also, Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Deyel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981); *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*). The *Dowell* court held that a fraudulent return was in effect no return at all, because the taxpayer had failed to evince "an honest and genuine effort to satisfy the law" within the meaning of *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), and *John D. Alkire Inv. Co. v. Nicholas*, 114 F.2d 607 (10th Cir. 1940).[4] It then reasoned that the fil-

4. *Zellerbach Paper* presented essentially the opposite of the problem posed by this case. A taxpayer filed a non-fraudulent return. Subsequent to the filing of that return, Congress passed the Revenue Act of 1921 which applied retroactively and had a *de minimis* effect on the tax liability of the company. After the limitations period had run, the government attempted to assess large deficiencies, on grounds unrelated to the 1921 Act, on the theory that the failure to file an amended return rendered the original return a nullity and tolled the statute of limitations. The Supreme Court rejected the argument, noting that where a return purported to be a return and evinced an honest and genuine endeavor to satisfy the law it would not be treated as a nullity because of inaccuracies or omissions. "Supplement and correction in such circumstances *will not take* from a taxpayer, *free from personal fault*, the protection of a term of limitation *already running for his benefit*." Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934) (emphasis added). Nothing in the opinion suggests that a culpable taxpayer, who files a fraudulent return with the intent to evade tax, renders the original fraudulent return a nullity for the purpose of the statute of limitations by filing an amended return.

ing of a non-fraudulent, amended return subsequent to the filing of a false and fraudulent original return would have exactly the same effect as the filing of a late original return following the fraudulent failure to file any return at all. Because in *Bennett v. Commissioner*, 30 T.C. 114 (1958), *acq.* 1958-2, C.B. 3, the Tax Court had held that the late filing of a non-fraudulent return began the running of the general three year statute of limitations, the court in *Dowell* concluded that the filing of a non-fraudulent amended return after the filing of an original fraudulent return also started the running of the limitations period. We disagree.

Section 6501(c)(1) is clear on its face. It permits the Commissioner "[i]n the case of a false or fraudulent return with the intent to evade tax" to assess the tax or proceed in court without an assessment "*at any time*." 26 U.S.C. §6501(c)(1) (emphasis added). There is nothing in the statute, its legislative history, or the regulations to indicate that the subsequent filing of an amended return has any effect on this provision.[5]

Original returns which are filed late, in contrast, are dealt with explicitly in section 6501(a):

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed

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5. We note that the treatment of amended returns is a matter of internal administration, and solely within the discretion of the Commissioner. Miskovsky v. U.S., 414 F.2d 954, 955 (3d Cir. 1969). Neither the Internal Revenue Code nor the Treasury Regulations make any provision for the acceptance of an amended return in place of the original return previously filed. Koch v. Alexander, 561 F.2d 1115, 1117 (4th Cir. 1977); Kearney v. A'Hearn, 210 F. Supp. 10, 16-17 (S.D.N.Y. 1962), *aff'd per curiam*, 309 F.2d 487 (2d Cir. 1962). *See also* Kaltreider Constr., Inc. v. United States, 303 F.2d 366, 368 (3d Cir. 1962), *cert. denied*, 371 U.S. 877 (1962) (three year period of limitation for filing refund claim is not altered by the filing of an amended return).

(whether or not such return was filed on or after the date prescribed).

(Emphasis added.) There is no comparable language relating to fraudulent original returns, and we have no reason to believe that Congress acted inadvertently when it treated the two situations differently.[6]

III.

Section 6501, as the district court noted in *Britton v. United States*, "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiences." 532 F. Supp. at 278. We find no evidence that Congress struck that balance in such a way as to permit the Commissioner only three years to proceed against persons who filed fraudulent original returns and later submitted non-fraudulent amended returns.

According to the taxpayers, if a citizen has alerted the government to problems with an original tax return by filing an amended return, there is no need to permit the Commissioner unlimited time to assess taxes and deficiencies; furthermore, treating repentent and unrepentent tax evaders alike under section 6501(c)(1) removes all incentive for taxpayers to amend their fraudulent returns. They also assert that to allow the I.R.S. unlimited time to dangle the threat of prosecution, like the sword of Damocles, over the heads of persons who have filed

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6. The court in *Dowell* declared that section 6501(c)(1) and section 6501(c)(3) are *in pari materia* and should, therefore, be construed consistently with one another. We agree with that statement but reach a different conclusion, because we believe that Congress provided a clear indication in section 6501(a) that it did intend "statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file." Dowell v. Commissioner, 614 F.2d at 1266.

amended returns is to invite abuse.[7] The relevant question, however, is not whether it would be wise for Congress to create incentives for filing amended returns after fraudulent returns were filed or to restrict the ability of the Commissioner to assess taxes at any time, but rather whether Congress, in fact, did so. We are limited to interpreting the statute before us. It is not our role to set tax policy.

Not only is the language of this section of the statute relating to fraudulent returns clear, but nothing in the structure of the Internal Revenue Code leads us to believe that Congress intended parties who filed fraudulent returns to be permitted to take advantage of the general three year statute of limitations. The willful filing of fraudulent returns with intent to evade tax is consistently treated as the most serious form of tax evasion. A person who commits such fraud subjects himself to major civil and criminal penalties. He cannot escape those penalties or eradicate the fraud merely by filing a non-fraudulent amended return.

The Commissioner has six years to assess deficiencies against taxpayers who omit more than 25 percent of their gross income from their original returns.[8] Amend-

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7. The appellees have pointed to no cases in which the Commissioner has used his power under section 6501(c)(1) to prosecute fraud "at any time" in an abusive way. As the government notes in its brief, there are no real incentives for it to delay bringing civil assessment actions and very powerful incentives for it to act as quickly as possible. Delays serve only to make it more difficult for the I.R.S. to carry its burden of proof in fraud cases. The Commissioner, recognizing the problems inherent in delay, specifically requires agents to keep investigations involving possible fraud as "current" as any other type of case, even though the agents theoretically are faced with no limits on when such actions could be brought. II Audit, CCH Internal Revenue Manual, §4565.51(3).

8. 26 U.S.C. §6501(e)(1)(A) states:

Substantial omission of items. Except as otherwise provided in subsection (c)—

ed returns have no effect on the six year period. *Houston v. Commissioner*, 38 T.C. 486 (1962); *Goldring v. Commissioner*, 20 T.C. 79 (1953). If, therefore, section 6501 were read as the taxpayers in these appeals urge us to do, we would create a situation in which persons who committed willful, deliberate fraud would be in a better position than those who, without an intent to commit fraud, had omitted more than 25 percent of their gross income from their original returns. There is no basis for concluding that in the single area of the statute of limitations Congress intended so to favor persons or corporations that have perpetrated tax fraud.

Moreover, the I.R.S. has advanced strong reasons for believing that a three year limitations period is not adequate to permit the Commissioner to meet his dual responsibility of proceeding both civilly and criminally. *Cf. United States v. LaSalle National Bank*, 437 U.S. 298, 308-309 (1978). It has long been the policy of the I.R.S. to defer civil assessment and collection until the completion of criminal proceedings. *See, e.g.*, Policy Statement P-4-84, 1 Administration, CCH Internal Revenue Manual, ¶1218; IV Audit, CCH Internal Revenue Manual, ¶¶4565.32(2) and 4565.42. This policy, which the Fifth Circuit characterized as both "necessary and wise," *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), permits the I.R.S. to avoid the serious constitutional problems that could be created by simultaneous

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(1) Income taxes. In the case of any tax imposed by subtitle A —

(A) General rule. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

proceedings, problems which can limit, for example, the availability of the ordinary tools for investigating civil tax liability once the commitment is made to refer a case for criminal prosecution. *U.S. v. LaSalle National Bank*, *supra*.

It is, furthermore, simply not the case that once an amended return is filed, the Commissioner can easily discover the fraud in the original return. The I.R.S. faces a heavy burden of proof in fraud cases, and thorough investigation of such frauds is a time-consuming process. *Klemp v. Commissioner*, 77 T.C. 201, 212-213 (1981) (Parker, J. dissenting). When passing the Act, Congress certainly knew of I.R.S. procedures and of the problems involved in ferreting out fraud. There is nothing to indicate that Congress intended to imply a term, absent in the statute itself, that would force the Commissioner to decide to proceed with only civil or criminal remedies or to jeopardize both by going forward civilly and criminally at the same time.

IV.

As Learned Hand reminded us, "[t]here is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed." *F.D.I.C. v. Tremaire*, 133 F.2d 827, 830 (2d Cir. 1943). But the courts in their search for the true purpose of Congress should not lightly go beyond the plain language of the statutes they are supposed to be interpreting, and arrogate to themselves the power to divine in oracular fashion which among constitutionally permissible alternatives is the appropriate one.

The decision of the Tax Court in *Badaracco* and the judgment of the district court in *Delect* will be reversed, and these cases will be remanded for further proceedings consistent with this opinion.

HUNTER, *Circuit Judge, dissenting*:

1. The majority holds that the filing of a non-fraudulent amended return after the filing of a fraudulent original return does not start the running of the three year statute of limitations in I.R.C. §6501(a) (1976) for the assessment of tax. I respectfully dissent.

2. The underlying facts involved in these appeals are not in dispute. In both cases, taxpayers originally filed fraudulent tax returns with the Commissioner. They later filed amended returns covering the same taxable periods. The Commissioner concedes that the amended returns were non-fraudulent and that they contained all the information the law required in the original filings. Over six years after the filing of the amended returns, the Commissioner issued deficiency notices for taxes allegedly owed by the taxpayers. Taxpayers sought relief,[1] arguing that the Commissioner's actions were barred by I.R.C. §6501(a) (1976), which requires the Commissioner to initiate the assessment and collection of tax within three years of the filing of a return. The Commissioner argued that his action was timely under section 6501(c)(1), which allows the Commissioner to initiate the assessment and collection of taxes at any time after the filing of a fraudulent return. I.R.C. §6501(c)(1) (1976). Applying the reasoning of *Doucll v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and *Klemp v. Commissioner*, 77 T.C. 201 (1981), *appeal docketed*, No. 81-7744 (9th Cir. November 5, 1981), the courts below found for the taxpayers. These appeals followed.

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1. In *Badaracco* the taxpayer filed a petition with the tax court for a redetermination of the deficiency under I.R.C. §6213(a) (1976 & Supp. IV 1980). In *Delect* the taxpayer paid the tax and then sought a refund in the District Court for the District of New Jersey pursuant to I.R.C. §7422 (1976 & Supp. IV 1980) and 28 U.S.C. §1346(a)(1) (1976).

3. Section 6501 lays out the basic time limitations on the assessment and collection of taxes by the Commissioner. Section 6501(a) provides in relevant part:

> (a) **General rule.** — Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

I.R.C. §6501(a) (1976). Section 6501(c)(1) provides:

> (1) **False return.** — In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

I.R.C. §6501(c)(1) (1976). Interpreting these two provisions, the majority finds section 6501(c)(1) to be "clear on its face" and holds it to be a complete exception to section 6501(a), even when the taxpayer files a subsequent, non-fraudulent amended return.

4. While recognizing that "[t]he starting point in every case involving construction of a statute is the language itself," *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring), the Court has recently admonished that "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. . . . This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Watt v. Alaska*, 451 U.S. 259, 266 (1981), *quoting Boston Sand Co. v. United*

States, 278 U.S. 41, 48 (1928).[2] In this case sufficient persuasive evidence exists to lead me to a different conclusion than the majority about the proper interpretation of section 6501. Because amended returns are not an explicit part of the statutory scheme, because a reasonable alternative reading of the statutory scheme is apparent, and because the majority's holding leads to distorted results, I am unable to accept the majority's reading of the statute's "plain meaning."

5. First, although section 6501(c)(1) might be "clear on its face" concerning the Commissioner's statutory authority to act when a false or fraudulent return is *first* filed, it is not "clear" on the issue presented here, the effect of a *subsequent* filing of a non-fraudulent amended return. The majority itself acknowledges, majority op. at ____ n.4, that Congress has not provided for amended returns under the statute and that the Commissioner's treatment of them is a matter solely within his discretion. *Koch v. Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977); *Miskovsky v. United States*, 414 F.2d 954, 955-56 (3d Cir. 1969); *Lion Associates, Inc. v. United States*, 515 F. Supp. 550 (E.D. Pa. 1981).[3] They

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2. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945).

3. Taxpayers point to one provision which mentions "amendments" to returns. I.R.C. §6213(g)(1) (1976 & Supp. IV 1980) defines "return" for the purposes of §6213 as "any return, statement, schedule, or list, and any amendment or supplement thereto . . . ." The legislative history indicates that this definition was in-

are a creation of the Internal Revenue Service and not of Congress. It is thus difficult to understand how their effect on the statute of limitations can be discerned solely from the language of the statute when Congress made no provision for amended returns within the statutory scheme.

6. Second, *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), offers a reasonable alternative interpretation of section 6501. *Accord Britton v. United States*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion*, No. 82-6246 (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), appeal docketed, No. 81-7744 (9th Cir. November 5, 1981).[4] In *Dowell*, the court recognized that the fraudulent original return is not a "return" for the purposes of section 6501(a). The court cited *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), in which the Supreme Court held that the statute of limitations began to run against deficiency assessments upon the filing of a first return if the first return is proper. The Court stated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such . . . and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180. Applying this princi-

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NOTE. — (*Continued*)

cluded to insure that the Commissioner reviewed all supporting schedules for "mathematical errors" before assessing deficiencies through summary proceedings. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 289-93 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 375-78 (1976). It does not indicate that Congress explicitly included amended returns within the statutory scheme.

4. *See Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Degel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981), *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*).

ple to the instant situation, the *Dowell* court reasoned that a fraudulent return is not an honest and genuine effort to satisfy the law and thus does not start the running of any statutory limitation period. *Dowell*, 614 F.2d at 1265-66; *cf. Kaltreider Construction Co. v. United States*, 303 F.2d 366, 368 (3d Cir.), *cert. denied*, 371 U.S. 877 (1962) (the first return must be complete and meet the statutory requirements; the statute of limitations will begin to run only upon the filing of a proper return) (dicta). Section 6501(c)(1) does apply whenever an inadequate return is filed, not as a statute of limitations, but rather as a provision allowing the government to institute a suit at any time.[5] When a valid return is filed, even in the form of an amended return to a previously filed fraudulent return, the limitation period of section 6501(a) begins to run.

7. Third, the *Dowell* court's statutory reading of section 6501 "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiencies." *Britton*, 532 F. Supp. at 278. While a fraudulent return may put the Commissioner at a special disadvantage in detecting errors, the filing of an amended return removes the disadvantage by providing the Commissioner with all the information required by law. The general rule, therefore, should govern. *Dowell*, 614 F.2d at 1265.[6] That interpretation also avoids the distorted re-

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5. As the Tenth Circuit recognized in *Dowell*, §6501(c) "represents the antithesis of a limitation period." 614 F.2d at 1265-66.

6. That reading is also consistent with the language of §6501(a) that tax must be assessed within three years after a return is filed "whether or not such return was filed on or after the date prescribed." I.R.C. §6501(a). When no return is filed, the Commissioner is able to act "at any time" under I.R.C. §6501(c)(3). If a return is later filed, however, the Commissioner then has all the necessary information to assess what tax is due, and the general three year period applies. *Dowell*, 614 F.2d at 1265; *Bennett v. Commissioner*, 30 T.C. 114, 124 (1958).

sult reached by the majority. Under the majority's holding, once a fraudulent return is filed, the threat of future assessment of deficiencies will hang in perpetuity like the Sword of Damocles over the head of the taxpayer, despite his efforts to set the record straight.[7]

8. In reaching my conclusion, I do not purport to set tax policy, rather merely to interpret the tax code in light of congressional purpose. *See Rose v. Lundy*, ____ U.S. ____, ____ (1982) (when Congress never thought of the problem, courts must examine a statute's underlying purposes to determine its proper scope); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."). My interpretation of section 6501 reflects the factual reality that the Commissioner has made amended returns an integral part of the administrative scheme,[8] even though Congress did not make it an explicit part of the statutory scheme. The differing conclusions reached by the majority and the tenth circuit indicate that Congress' intent under this provision is far from clear and that perhaps section 6501 is a proper area for further legislative scrutiny. I am unable nonetheless to join the majority's hold-

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7. The application of the three year statute of limitations will not allow a taxpayer who previously filed a fraudulent return to "escape [the] penalties or erase the fraud merely by filing a non-fraudulent amended return." Majority op. at ____. The taxpayer is still subject to civil and criminal sanctions as long as the Commissioner acts within three years.

8. The Commissioner's regulations provide for the use of amended returns by the Internal Revenue Service. *See, e.g.*, 26 C.F.R. §§301.6211-1(a), .6402-3(a)(5) (1982). When the I.R.S. has accepted amended returns, as in this case, the courts have given them effect. *E.g., United States v. Samara*, 643 F.2d 701, 704 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981); *Rooka alter v. Mayer*, 345 F.2d 476, 480 (8th Cir. 1965).

ing that section 6501, as presently written, does not provide for the application of a three year statute of limitations in this case."

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—Judgment of the Third Circuit Court of Appeals, Dated November 29, 1982.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-3033

ERNEST BADARACCO, Sr., and ROSE BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE

(T.C. No. Docket No. 1700-78)

ERNEST BADARACCO, Jr. and BARBARA BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellant in No. 81-3033

(T.C. Nos 1700-78 & 1701-78)

No. 82-5171

DELEET MERCHANDISING CORP.

vs.

THE UNITED STATES OF AMERICA,

Appellant in No. 82-5171

(D.C. Civ. No. 80-00026)

ON APPEAL FROM THE UNITED STATES TAX COURT and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, HUNTER and BECKER, *Circuit Judges*

JUDGMENT

These causes came to be heard on the records from the United States Tax Court and the United States District Court for the District of New Jersey and were argued by counsel September 16, 1982.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court entered August 11, 1981, and the judgment of the said District Court, entered December 23, 1981, be and the same are hereby reversed and the causes remanded to the said Courts for further proceedings in accordance with the opinion of this Court.

Attest:

SALLY INVOS
Clerk

November 29, 1982

APPENDIX C—Decision of the Third Circuit Court of Appeals Denying Appellee's Petition for Rehearing.

UNITED STATED COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-5171

DELEET MERCHANDISING CORPORATION

v.

UNITED STATES OF AMERICA

(C.A. No. 80-00026)

SUR PETITION FOR REHEARING

EN BANC

Present:

SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEISS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges.*

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

ALAN B. ADAMS
Circuit Judge

Dated: Dec 23 1982

APPENDIX D—Opinion of the United States District Court for the District of New Jersey Granting Plaintiff's Motion for Summary Judgment.

Not for Publication

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

DELEET MERCHANDISING CORPORATION,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 80-0026

Appearances:

Fredericks & Messinger, By: Barry I. Fredericks, Esq., 39 Hudson Street, Hackensack, New Jersey 07601; Goldschmidt, Fredericks & Oshatz, By: Edward Sussman, Esq., 655 Madison Avenue, New York, New York 10021 (Attorneys for Plaintiff); Stephen T. Lyons, Esq., Trial Attorney, Tax Division, Department of Justice, Washington, DC 20530 (Attorney for Defendant)

FISHER, Chief Judge.

This is a motion for summary judgment brought by plaintiff, Deleet Merchandising Corporation, against defendant, the United States of America. For reasons stated herein, the motion is granted.

Plaintiff timely filed its 1967 and 1968 corporate income tax returns with the Internal Revenue Service and paid the tax shown to be due thereon. In August 1973, plaintiff filed amended income tax returns for 1967 and 1968 in which it requested a refund for 1967 and paid an additional tax due for 1968. In December 1979, the I.R.S. issued a statutory notice of deficiency to plainttff stating that the claim for a refund for 1967 was disallowed and that there was a further tax deficiency for both years. Plaintiff then paid the asserted deficiencies and penalties and, in May 1980, filed a claim for a refund for those amounts on the ground that its amended returns were correct as filed.

Plaintiff also filed this action for a refund of the asserted deficiencies on the grounds that the I.R.S.' determination was improper, illegal and erroneous. Plaintiff now brings this motion for summary judgment pursuant to Fed. R. Civ. P. 56 alleging that the defendant is time-barred under 26 U.S.C. §6501 which requires any tax to be assessed by the I.R.S. within three years after a return is filed. Defendant opposes the motion on the ground that this court lacks jurisdiction to hear the §6501 statute-of-limitations issue.

Plaintiff alleged jurisdiction in its complaint under 28 U.S.C. §1346(a)(1) which grants the district courts original jurisdiction of any civil action against the United States for the recovery of any tax or penalty alleged to have been erroneously or illegally assessed or collected. However, that statute is supplemented by 26 U.S.C. §7422(a) which requires a taxpayer to file an administrative claim for a refund with the I.R.S. before a suit can be maintained

in a district court. Treasury regulation 26 C.F.R. §301.6402-2(b) further requires a claim for a refund to set forth in detail each ground upon which the refund is claimed. Thus, "[a] prerequisite of jurisdiction of the district court conferred by 28 U.S.C. §1346(a)(1) is the filing of a claim for refund so that the Internal Revenue Service may first pass upon the validity of it. 26 U.S.C. §7422(a)." *Miniature Vehicle Leasing Corp. v. United States*, 266 F. Supp. 697, 702 (D.N.J. 1967). In addition, "[t]he law is well settled that a plaintiff in a tax refund suit may only recover upon the grounds specifically set forth in the [administrative] refund claim." *Spaeder v. United States*, 478 F. Supp. 73, 80 (W.D. Pa. 1978).

Plaintiff in this case complied with the section 7422(a) requirement by filing an administrative claim for a refund; however, that claim merely alleged that plaintiff's amended tax returns for the years in question were correct as filed. Thus, the defendant bases its jurisdictional argument on the ground that plaintiff did not set forth the section 6501 statute-of-limitations issue in the claim for a refund. However, plaintiff has cured the jurisdictional defect by recently filing an amended claim for a refund with the I.R.S., which includes the section 6501 issue. This amended claim was timely filed. 26 U.S.C. §6511(a). Thus, defendant's jurisdictional argument is moot.

Plaintiff now seeks a summary judgment alleging that there are no genuine issues of material fact and that defendant is precluded from assessing the tax deficiency in question because the assessment was untimely. It is provided in 26 U.S.C. §6501(a) that

> [e]xcept as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . .

However, 26 U.S.C. §6501(c)(1) states that

> [i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Plaintiff now argues that its non-fraudulent amended returns, filed in 1973, triggered the 3-year statute-of-limitations period in section 6501(a). Defendant argues that plaintiff's original returns were fraudulent, thus allowing the I.R.S. to assess a tax "at any time" under section 6501(c)(1). Assuming for purposes of this motion that the original returns were indeed fraudulent, the issue is whether an original false or fraudulent return with the intent to evade tax allows the I.R.S. to assess the tax at any time regardless of any non-fraudulent amended return that is later filed.

This issue was decided in favor of the taxpayer in *Dowell v. C.I.R.*, 614 F.2d 1263 (10th Cir. 1980). In that case, the court characterized section 6501(c)(1) as "the antithesis of a limitations concept." 614 F.2d at 1265-1266. The filing of a fraudulent return does not start any limitations period running; rather, it simply allows the I.R.S. to assess the tax due at any time. The court noted that "[t]he purpose of §6501(c)(1) is to provide the Government time to unearth information the taxpayer did not furnish and to file an assessment." 614 F.2d at 1266. On the other hand, once the I.R.S. has the information from a non-fraudulent amended return, " 'there can be no policy in favor of permitting assessment thereafter at any time without limitation.' " *Id.* (citation omitted). Thus, the filing of a non-fraudulent amended return will start the running of the 3-year statute of limitations in section 6501(a). This reasoning was followed in *Klemp v. Commissioner*, 77

T.C. ____, No. 17 (Aug. 5, 1981). See also *Badaracco v. Commissioner*, 42 T.C.M. 573 (1981).

Fed. R. Civ. P. 56(c) provides that summary judgment should be granted if "there is no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." My examination of the pleadings, briefs and affidavits reveals that there are no genuine issues of material fact. Whether plaintiff's original returns were fraudulent is not a material issue of fact since it has no bearing on the outcome. In 1973 plaintiff filed non-fraudulent amended income tax returns for the 1967 and 1968 tax years. The 3-year statute of limitations in section 6501(a) began to run at this time. Thus, the I.R.S. assessment of a tax deficiency and penalties in 1979 was untimely. Accordingly, plaintiff's motion for summary judgment is granted. The order previously submitted by plaintiff is filed with this opinion.

December 22, 1981.

APPENDIX E—Order of the District Court for Summary Judgment.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

DELEET MERCHANDISING CORP.,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

Civil Action N0. 80-26

Judge Clarkson Fisher

Plaintiff, having moved the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and said motion having regularly come on to be heard on the 14th day of December, 1981, and the Court having found that plaintiff is entitled to judgment as a matter of law, it is

ORDERED that plaintiff's motion is in all respects granted and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff and against defendant in the sum of One Hundred Fourteen Thousand One Hundred Ninety-Three Dollars and Eighty-Three Cents ($114,193.83) together with interest and costs as provided by law.

12/22/81

CLARKSON FISHER
U.S.D.J.

APPENDIX F—Order Withdrawing Defendant's Motion to Vacate the Court's Order in the Case of *Liroff v. Commissioner.*

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

ELLIOT LIROFF and EVELYN LIROFF,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 3219-80

ORDER

On January 20, 1983, respondent filed a motion to vacate the Court's order dated August 3, 1982 granting petitioner's motion for partial summary judgment in the above-entitled case. On February 1, 1983, respondent informally requested that this motion be withdrawn. Upon due consideration, it is

ORDERED that respondent's motion to vacate the Court's order dated August 3, 1982 granting petitioner's motion for partial summary judgment is hereby withdrawn.

DATED: February 4, 1983
Washington, D.C.

PERRY SHIELDS
Judge

SEE COMPANION CASE

Nos. 82-1453 and 82-1509

In the Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST BADARACCO SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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Solicitor General

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QUESTION PRESENTED

Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * *." Section 6501(c)(1) sets forth an exception for false or fraudulent returns, providing that in such cases, "the tax may be assessed * * * at any time."

The question presented is whether the statutory exception prescribing that no period of limitations is applicable to fraudulent returns requires that where a fraudulent return is filed in the first instance, the subsequent filing of an amended nonfraudulent return does not commence the running of the three-year statute of limitations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1453

ERNEST BADARACCO SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

No. 82-1509

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The consolidated opinion of the court of appeals (82-1453 Pet. App. 4a-20a; 82-1509 Pet. App. 1a-17a) is reported at 693 F.2d 298. The opinion of the Tax Court in No. 82-1453 (Pet. App. 21a-27a) is not reported. The opinion of the district court in No. 82-1509 (Pet. App. 1d-5d) is reported at 535 F. Supp. 402.

JURISDICTION

The judgment of the court of appeals (82-1453 Pet. App. 2a-3a; 82-1509 Pet. App. 1b-2b) was entered on November 29, 1982. Petitions for rehearing (82-1453 Pet. App. 1a; 82-1509 Pet. App. 1c-2c) were denied on December 20 and December 23, 1982. The petitions for a writ of certiorari were filed on February 24, 1983 (No. 82-1453) and March 8, 1983 (No. 82-1509), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. *No. 82-1453.* Petitioners Ernest Badaracco, Sr., and Ernest Badaracco, Jr.,[1] were partners in an electrical contracting business. For each of the years 1965 through 1969, they filed individual and partnership returns that fraudulently understated their partnership income. On August 17, 1971, after federal grand juries had subpoenaed the partnership's books and records, petitioners filed nonfraudulent amended returns for the years in question. Petitioners were thereafter indicted on 15 counts for filing false and fraudulent income and partnership tax returns in violation of 26 U.S.C. 7206(1). They each entered a plea of guilty to the charge of filing a false and fraudulent partnership return for 1967, and the district court entered a judgment of conviction on June 6, 1973.[2] *United States* v. *Badaracco*, No. 766-71 (N.J. Crim.) (82-1453 Pet. App. 6a-7a, 23a-24a).

On November 21, 1977, the Commissioner of Internal Revenue issued notices of deficiency for the years in question, asserting liability for additions to tax under Section

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[1]Their wives, Rose Badaracco and Barbara Badaracco, are parties to this action only because they filed joint federal income tax returns for the years in issue with their respective husbands.

[2]The remaining counts of the indictment were dismissed.

6653(b) of the Internal Revenue Code of 1954 (26 U.S.C.), on account of fraud. In these proceedings brought in the Tax Court for a redetermination of the deficiencies, petitioners stipulated that the underpayments of tax on their original income tax returns were due to fraud. They contended, however, that assessments of the deficiencies was nevertheless barred by the statute of limitations under Section 6501(a) of the 1954 Code because the deficiency notices were not issued within three years after the filing of their amended returns. The Tax Court, following its decision in *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.), and the Tenth Circuit's decision in *Dowell* v. *Commissioner*, 614 F.2d 1263 (1980), upheld petitioner's position that the assessments were time barred (82-1453 Pet. App. 7a, 24a-27a).

b. *No. 82-1509.* Petitioner Deleet Merchandising Corp. filed timely corporate income tax returns for 1967 and 1968, but failed to report certain receipts for those years. It thereafter filed amended returns disclosing the unreported receipts on August 9, 1973. Following lengthy criminal and civil investigations, the Commissioner issued a notice of deficiency to Deleet on December 14, 1979, asserting deficiencies in tax and additions to tax for fraud under Section 6653(b) for both years. After paying the disputed amounts, Deleet brought this refund suit in the United States District Court for the District of New Jersey. In its motion for summary judgment, Deleet asserted that, even if the original returns had been fraudulent, the deficiencies and penalties could not be assessed more than three years after the filing of the amended returns. The district court, likewise relying on *Dowell* v. *Commissioner*, *supra*, and *Klemp* v. *Commissioner*, *supra*, granted summary judgment in favor of Deleet (82-1509 Pet. App. 1d-5d).

2. The court of appeals reversed in both cases, with one judge dissenting (82-1453 Pet. App. 4a-20a; 82-1509 Pet. App. 1a-17a). The court concluded that the terms of Section 6501(c)(1) permit the Commissioner "[i]n the case of a false or fraudulent return with the intent to evade tax" to assess the tax or proceed in court without an assessment "at any time." In the court's view, nothing on the face of the statute, its legislative history, or the regulations indicates that taxpayers who had filed fraudulent returns could thereafter claim the benefit of the general three-year statute of limitations by filing nonfraudulent amended returns. The court also noted that the three-year period was inadequate to permit the Commissioner to meet his dual responsibility of proceeding in fraud cases both criminally and civilly (82-1453 Pet. App. 12a-13a; 82-1509 Pet. App. 9a-10a).

DISCUSSION

The court of appeals correctly held that the filing of a nonfraudulent amended return does not start the running of the ordinary three-year statute of limitations under Section 6501(a) of the 1954 Code where a fraudulent return for the year in question was filed in the first instance.

1. Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "[e]xcept as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Among the exceptions to that general rule is that set forth in Section 6501(c)(1), which provides that "[i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed * * * at any time."

It has long been recognized that statutes of limitations with respect to the assessment and collection of taxes are to be narrowly construed. See, *e.g.*, *Bowers* v. *New York &*

Albany Lighterage Co., 273 U.S. 346, 349 (1927); *Lucia* v. *United States*, 474 F.2d 565, 570 (5th Cir. 1973); *McDonald* v. *United States*, 315 F.2d 796, 801 (6th Cir. 1963). Thus, a statute of limitations will not be presumed to apply in the absence of clear congressional direction, and may not be extended beyond its clear language. *McDonald* v. *United States*, *supra*. Moreover, it is a basic principle of statutory construction that a specific statute controls over a general provision. *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 761 (1961).

The exception to the general three-year period of limitations provided by Section 6501(c)(1) applies "[i]n the case of a false or fraudulent return with the intent to evade tax." It is unqualified on its face. Petitioners in *Badaracco* admittedly filed such false and fraudulent returns for the years there in question. Likewise, petitioner in *Deleet* was required to assume, for purposes of its motion for summary judgment, that its original returns for 1967 and 1968 were fraudulent. These cases remained "case[s] of a false or fraudulent return" notwithstanding the subsequent filing of nonfraudulent amended returns. See *George M. Still, Inc.* v. *Commissioner*, 19 T.C. 1072 (1953), aff'd, 218 F.2d 639 (2d Cir. 1955); *Plunkett* v. *Commissioner*, 465 F.2d 299, 303 (7th Cir. 1972). Nothing in the statute or its legislative history supports petitioners' contentions that the filing of a nonfraudulent amended return after the filing of a fraudulent original return starts the normal three-year period of limitations in Section 6501(a). Rather, it is clear under Section 6501(c)(1) that "if a return be fraudulent in any respect with intent to evade a tax, it deprives the taxpayer of the bar of the statute for that year." *Lowy* v. *Commissioner*, 288 F.2d 517, 520 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).

Indeed, not only is there no reference in the language of Section 6501(a) or (c)(1) to the subsequent filing of

amended returns, but there is no statutory authority anywhere in the Internal Revenue Code for the filing of such returns.[3] Thus, as this Court recently pointed out in *Hillsboro National Bank* v. *Commissioner*, No. 81-485 (Mar. 7, 1983), slip op. 8 n 10, "it is settled that the acceptance of * * * [an amended] return * * * after the date for filing a return is not covered by statute but within the discretion of the Commissioner." See, *e.g.*, *Koch* v. *Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977); *Miskovsky* v. *United States*, 414 F.2d 954, 955 (3d Cir. 1969)."[4]

Moreover, the courts have consistently held in other contexts that the filing of amended returns has no bearing on the operation of the statute of limitations. Thus, in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934) and *National Paper Products Co.* v. *Helvering*, 293 U.S. 183 (1934), this Court held that the Commissioner could not rely on the filing of an amended or supplemental return as a basis for extending the statutory period for assessment and collection. Likewise, in *Goldring* v. *Commissioner*, 20 T.C. 79 (1953) and *Houston* v. *Commissioner*, 38 T.C. 486 (1962), the Tax Court held that, where

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[3]Section 6213(g)(1) of the 1954 Code defines the term "return," for the limited purpose of the summary assessment procedures applicable where an underpayment is based on "mathematical or clerical errors appearing on the return" (see Section 6213(b)), as including "any return, statement, schedule, or list, and any amendment or supplement thereto" (26 U.S.C. (Supp. V) 6213(g)(1)). But even the dissenting judge below acknowledged (82-1453 Pet. App. 16a-17a n.3; 82-1509 Pet. App. 13a-14a n.3) that this provision was adopted solely to insure that all supporting schedules on file be examined by the Commissioner before determining that there is an underpayment based on such a mathematical or clerical error. Hence, Section 6213(g)(1) has no bearing on the question presented by the petitions.

[4]It is undisputed that the amended returns in each of these cases were filed long after the expiration of the time for filing the original return. See 82-1453 Pet. App. 6a-7a; 82-1509 Pet. App. 4a.

the filing of a return with an understatement in gross income in excess of 25% activated the extended limitations period under the 1939 Code (26 U.S.C. (1940 ed.) 275(c)) predecessor of Section 6501(e) of the 1954 Code, later amended returns reducing the understatement below 25% could have no effect on the extended assessment period. Accord: *Foster* v. *Commissioner*, 45 B.T.A. 126 (1941), aff'd, 131 F.2d 405 (5th Cir. 1942). See also *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366, 368 (3d Cir.), cert. denied, 371 U.S. 877 (1962); *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924).

In sum, once petitioners filed fraudulent original returns, they plainly lost any benefit of the statute of limitations for the years in question. To conclude otherwise would ignore the plain language of the statute itself. Thus, the court of appeals correctly held that Section 6501(c)(1) continues to apply in these circumstances. Accord, *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983).

2. The court below acknowledged (82-1453 Pet. App. 8a-10a; 82-1509 Pet. App. 5a-7a) (as did the Fifth Circuit in *Nesmith, supra*) that its ruling conflicted with *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and the cases that have followed it (*e.g., Britton* v. *United States*, 532 F. Supp. 275 (D. Vt. 1981), aff'd, 697 F.2d 288 (2d Cir. 1982) (table) and *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.). In *Dowell*, the court placed primary reliance on the Tax Court's decision in *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), which involved the 1939 Code predecessor of Section 6501(c)(3), allowing assessment at any time in the case of a "failure to file a return." The Tax Court in *Bennett* held that the filing of a late *original* return started the running of the ordinary three-year period of limitations. As the Tax Court noted in its decision in *Dowell* v. *Commissioner*, 68 T.C. 646, 650-651 (1977), rev'd, 614 F.2d 1263 (10th Cir. 1980), *Bennett* is

inapposite. Once the delinquent returns were filed in *Bennett*, it was no longer strictly a case of a "failure to file a return," but only a case of a failure to file a *timely* return. Here, the original returns filed by petitioners were a "case of a false or fraudulent return." That conclusion stands despite the fact that they untimely disclosed the fraudulent omissions on later-filed amended returns.[5]

Moreover, while the late original returns in *Bennett* were unquestionably "the return[s]" for the years there in question, the amended returns filed in the instant cases cannot be considered as "the return[s]" for the years here in question within the meaning of Section 6501(a) (cf. *National Refining Co.* v. *Commissioner, supra*). Thus, they could not have any independent significance for the purposes of that provision even if the provisions of Section 6501(c)(1) were disregarded.[6]

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[5]Indeed, in revising these limitations provisions when the 1954 Code was adopted, Congress acted to remove any ambiguity that might be thought to inhere in the 1939 Code provisions (which were later before the Tax Court in *Bennett*) by specifically providing in Section 6501(a) that the three-year period, where applicable, begins to run on the date "the return was filed (whether or not such return was filed on or after the date prescribed) * * *." No similar provision was adopted with respect to the effect of filing amended returns after the filing of false or fraudulent original returns. Thus, as the court below concluded (82-1453 Pet. App. 10a n.6; 82-1509 Pet. App. 7a n.6), Congress did, in fact, provide a clear indication that it did not intend that the two situations would be entitled to precisely the same treatment under these provisions.

[6]The court in *Dowell* reasoned that the original fraudulent Forms 1040 filed in that case were not "returns" at all within the meaning of these provisions and that the amended returns were, therefore, the only "returns" filed by that taxpayer for the years in question. 614 F.2d at 1265. That analysis, however, is based on a misreading of this Court's opinion in *Zellerbach Paper Co.* v. *Helvering, supra*. After the taxpayer in *Zellerbach* had filed original returns for the periods there in question, certain changes were made in the applicable law, and a Treasury Regulation was adopted requiring the filing of amended or supplemental returns if additional taxes were owing as a result of the changes. Although the taxpayer failed to file such an amended return,

Moreover, the court below noted (82-1453 Pet. App. 12a-13a; 82-1509 Pet. App. 9a-10a), that there are, in fact, substantial reasons why Congress could conclude that the imposition of a three-year limitations period on assessment in such cases would be inadequate to allow the Commissioner to fulfill his obligation to enforce both the civil and criminal provisions of the Internal Revenue Code. In addition to other factors supporting the deferral of civil assessment pending the completion of related fraud investigations,[7] the Internal Revenue Service loses its entitlement to

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the additional liability in its case could have been computed on the basis of the information shown on its original returns. This Court concluded that, whether or not an amended return had been filed, the Commissioner remained subject to the ordinary assessment period running from the date the original return for each year was filed. In so ruling, the Court noted that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it *purports* to be a return, is *sworn to* as such * * * and *evinces* an honest and genuine endeavor to satisfy the law" and that "the limitation shall run from the original return when there is nothing *on the face of that return* to indicate that the liability reported is less than owing." 293 U.S. at 180, 182 (emphasis added; footnote omitted).

Contrary to the Tenth Circuit's analysis, the *Zellerbach* decision does not support its conclusion that a return that *purports* to be a complete and accurate return, but which is nonetheless false or fraudulent, is a mere "nullity" for statute of limitations purposes. It could scarcely be doubted that such "returns" are precisely what Congress had in mind in enacting the provisions of Section 6501(c)(1). Presumably it used the term "the return" in Section 6501(a) with the same understanding. Indeed, if fraudulent Forms 1040 were not "returns" for these purposes, Section 6501(c)(1) would be not only superfluous, but also a contradiction of terms.

[7]It has long been the policy of the Internal Revenue Service to defer the assessment of civil liability, where possible, in such cases. See Policy Statement P-4-84, 1 Internal Revenue Manual—Administration (CCH) para. 1218, at 1303-78 (Dec. 1980). The wisdom of that policy, in light of the potential for interference in the orderly prosecution of criminal cases if civil suits could be simultaneously maintained by the taxpayer for the same period, was noted in *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962).

use one of its most effective civil investigative tools—*i.e.*, the summons procedure authorized by Section 7602 of the Code—once it refers the case to the Department of Justice for prosecution. See *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978); 26 U.S.C. 7602(c). Moreover, as the court below also noted (82-1452 Pet. App. 13a; 82-1509 Pet. App. 10a), cases involving false or fraudulent returns ordinarily place a far greater investigative burden on the Commissioner than other civil cases. That amended returns that purport to correct the original omissions may later be filed does not substantially reduce that investigative burden even though a thorough investigation may ultimately establish that the amended returns were not themselves fraudulent.[8]

3. While we believe the decision below is correct, we agree with the petitioners that there is a square conflict between this case and the Fifth Circuit's decision in *Nesmith*, on the one hand, and the Second and Tenth Circuits' decisions in *Britton* and *Dowell*, on the other. Moreover, the question is of considerable administrative importance. We are advised by the Internal Revenue Service that there are now 118 cases pending administratively with $11.8 million in taxes at stake, and 15 cases in litigation wih a total of $792,550 at issue. We agree that resolution of the conflict by this Court is therefore warranted.

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[8]Petitioner Deleet asserts (82-1509 Pet. 10-11) that the decision below "discourages the conscientious and repentant taxpayer" who has filed fraudulent returns from filing amended returns disclosing his true income. On the contrary, the decision is simply neutral in this regard, placing the taxpayer in neither a better nor worse position than he was before. At all events, as the court of appeals properly stated (82-1453 Pet. App. 11a; 82-1509 Pet. App. 8a), the relevant question is not whether it would be wise for Congress to create incentives for filing amended returns after fraudulent returns were filed, but rather, "whether Congress, in fact, did so."

CONCLUSION

The petitions for a writ of certiorari should be granted. The Court may wish to consolidate the cases.

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APRIL 1983

DOJ-1983-04

Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., *et al.*,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DELEET MERCHANDISING CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER, DELEET MERCHANDISING CORP.

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Of Counsel

Question Presented

Does the subsequent filing of a complete and honest amended return start the running of the statute of limitations provided in Section 6501(a) as Taxpayer contends, or does the filing of an allegedly fraudulent return give the Government the right in perpetuity to assess deficiencies and penalties—no matter what remedial steps are taken by the taxpayer—as the Government contends?

TABLE OF CONTENTS

PAGE

Table of Authorities

Cases Cited

Statutes Cited

Miscellaneous

Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., *et al.*,

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v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER, DELLET MERCHANDISING CORP.

Opinions Below

The opinion and order of the District Court for the District of New Jersey, dated and entered December 22, 1981, is reported at 535 F.Supp. 402. A copy of that opinion is reproduced at page 1d of the Appendix filed as part of Petitioner's Petition for a Writ of Certiorari. The opinion of the Court of Appeals for the Third Circuit, dated November 29, 1982, is reported at 693 F.2d 298 and reproduced at page 1a of the Appendix to the Petition.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on November 29, 1982. (PA -2b)[1] A petition for rehearing and for rehearing *en banc* was denied on December 23, 1982. (PA -1c) The Petition for a Writ of Certiorari was filed with this Court on March 11, 1983 and an order granting said petition was entered on May 16, 1983.

Applicable Statute

Section 6501 of the Internal Revenue Code of 1954, as amended, provides in pertinent part:

> "§6501(a) GENERAL RULE—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3

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[1] Parenthetical references (PA -) are to the Appendix filed as part of Petitioner's Petition for a Writ of Certiorari. Parenthetical references (JA -) are to the Joint Appendix filed in this matter.

years after the return was filed (whether or not such return was filed on or after the date prescribed) • • • and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

• • •

(c) EXCEPTIONS—

(1) FALSE RETURN—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by sub-title A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.

(3) NO RETURN—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Statement of the Case

A. Nature of the case.

The petitioner Delect Merchandising Corp. (hereinafter sometimes referred to as the "Taxpayer"), is a New Jersey corporation. The respondent is the United States of America (hereinafter referred to as the "Government"). The Taxpayer timely filed its corporate tax return for

calendar years 1967 and 1968. On August 9, 1973, Petitioner voluntarily filed amended returns for those years. (JA -55a-56a) On December 21, 1979 (more than 6 years subsequent to the filing of Taxpayer's amended returns), the Internal Revenue Service issued a Notice of Deficiency (JA -71a). The issue to be resolved is whether Petitioner's filing of honest and complete amended tax returns in 1973 commenced the running of the three year statute of limitations of Internal Revenue Code Section 6501 (a), 26 U.S.C. §6501(a).

B. Procedural history.

On January 4, 1980, after paying the amounts assessed by the Government, Petitioner commenced this action by filing its Complaint in the United States District Court for the District of New Jersey. The complaint alleged that the Government erroneously and illegally assessed corporate income taxes and penalties totalling $38,604.00 for 1967 and $75,589.93 for 1968, and demanded judgment in those amounts, with interest as provided by law. (JA -44a-47a) On March 21, 1980, the Government filed its Answer, which denied that the assessments were erroneous or illegal. (JA -49a-51a)

On December 14, 1981, the Petitioner moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment, on the ground that the assessment of tax by the Government was time barred under the three year limitation in Subsection 6501(a) of the Code. (JA -52a)[2] The Government opposed on the ground that notwithstanding the filing of complete amended returns,

[2] All references herein to "Code" are references to the Internal Revenue Code of 1954, as amended, unless otherwise stated.

the allegedly fraudulent nature of the original returns entitled it to make its assessment without regard to any period of limitation.[3]

By opinion and order dated and entered December 22, 1981, the District Court (Fisher, Chief Judge) granted Summary Judgment in favor of the Petitioner, holding that the Petitioner's filing in 1973 of complete, accurate and nonfraudulent amended income tax returns for the years 1967 and 1968 commenced the running of the three-year limitations period provided in Subsection 6501(a) of the Code. (Reported at 535 F.Supp. 402 (1982) (PA -1d))

On February 18, 1982, the Government filed its Notice of Appeal to the United States Court of Appeals for the Third Circuit. (JA -79a) On November 29, 1982, a divided Court of Appeals reversed the District Court. The majority held that under the literal terms of Subsection 6501(c)(1) the Government had a right in perpetuity to assess taxes and deficiencies against the Petitioner. (Reported at 693 F.2d 298 (3d Cir. 1982) (PA -1a)). Petitioner's petition for rehearing and rehearing *en banc* was denied by the Court of Appeals on December 23, 1982. (PA -1c)

On March 11, 1983, the Petitioner filed a Petition for a Writ of Certiorari with this Court which was granted by order entered on May 16, 1983.

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[3] The Government's allegation that the original returns were fraudulent has never been adjudicated The District Court noted that the fraudulent or nonfraudulent nature of those returns was irrelevant and had no bearing on the legal issue presented. (PA -5d)

C. Relevant facts.

There are no disputed facts in this case and the issue to be determined is exclusively one of law.[4]

It is agreed that Petitioner timely filed its corporate income tax returns for the years ending December 31, 1967 and December 31, 1968 (the "original returns") and paid the taxes shown to be due. (PA -4a)

On August 9, 1973 the Taxpayer, at a time when it was not subject to any criminal or civil investigation by the Government, filed amended tax returns for the tax years 1967 and 1968 (the "amended returns"). (JA -54a, 56a) The amended returns were accepted for filing by the Government and were completely accurate. (JA -76a) The amended returns show a refund due to Taxpayer of $6,206.00 for 1967 and an additional tax of $36,314.01 for 1968. (JA -57a-70a, 71a)

On December 14, 1979, more than six years after the amended returns were filed, the Government issued a Notice of Deficiency. (JA -71a) The Notice of Deficiency, which was based upon the information provided by Taxpayer in the amended returns, disallowed Taxpayer's 1967 refund claim and assessed a deficiency of $25,248.00 and penalties of $13,356.00 for that year. With respect to 1968 the Notice of Deficiency assessed $36,314.01 as additional tax and penalties of $39,275.82. (JA -71a) On or about December 27, 1979, the Taxpayer paid the deficiencies and penalties assessed. (JA -55a)

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[4] The Government submitted no affidavits or documentation to the District Court in opposition to the Petitioner's Motion for Summary Judgment. Thus, all facts set forth in the Petitioner's affidavit submitted in the District Court must be accepted as true.

Summary of Argument

The statute of limitations set forth in Subsection 6501(a) of the Code bars the assessment or collection of any tax deficiencies from Taxpayer for the taxable years 1967 and 1968. Assuming *arguendo* that Taxpayer's original returns for those years were fraudulent, the subsequent filing by Taxpayer in 1973 of complete and honest amended returns for those tax years commenced the running of the three-year limitations period. The purpose underlying the enactment of statutes of limitations generally, and Section 6501 specifically, offers no other conclusion. Once a taxpayer has placed into the hands of the tax authorities the accurate information necessary to enable the Government to properly make an assessment, that taxpayer is entitled to the repose afforded by the statute of limitations enacted by Congress for that very purpose.

The Government has consented to and acknowledged that a taxpayer who fraudulently fails to file a return may nevertheless commence the limitations period under Section 6501(a) by subsequently filing a nonfraudulent "delinquent" return. No real distinction exists between that situation and the initial filing of a fraudulent return which is subsequently followed by the filing of an honest amended return.

The attempt by the Government to draw a distinction, for limitations purposes, between "amended" returns and "delinquent" returns is unfounded. Each such return is an embodiment of the taxpayer's attempt to rectify an earlier transgression. In each instance the taxpayer is correcting earlier acts, which are insufficient to commence any period of limitation with respect to the Government's power to assess. The Government nevertheless continues to attempt to draw such a distinction by resorting to the

most technical of arguments. The argument advanced by the Government in opposition ignores the true nature of the taxpayer's subsequent voluntary filing and attempts to diminish the corrective nature of this act by elevating form over substance. Thus, its argument that "amended" returns are not authorized by statute ignores the fact that such amended returns are not only encouraged by the Government but are submitted on the very form supplied by the Government.

Petitioner urges that the statute under consideration be interpreted in accordance with its intended purpose. Subsection 6501(a) is a general statute of limitations. Subsection 6501(c) sets forth exceptions to the general rule, and is therefore not in and of itself a statute of limitations. Thus, when the taxpayer files either a "delinquent" or honest "amended" return, the exceptions embodied in Subsection 6501(c) are no longer operative and the limitation period begins to run. In sharp contrast, the Government advocates a most tortured construction which would grant priority to an exception at the expense of the statutory general rule.

The Government submits that the voluntary filing of an amended return by a contrite taxpayer does not deprive the Government of its rights to assess the tax in perpetuity. This contention is not only unfair to the individual taxpayer, but is also not in the Government's best interests, for it dissuades the individual taxpayer from re-evaluating his prior acts and coming forth and voluntarily filing an amended return and paying the additional tax that may be due. Further, the Government would have this Court establish one rule for those taxpayers who seek to evade payment of their tax by failing to file a return, and a separate and far more oner-

ous rule for those who file fraudulent returns and subsequently file honest amended returns. Taxpayer submits that this would result in giving preferential treatment to one form of tax fraud over another.

The alleged policy considerations based upon bureaucratic difficulties urged by the Government are without the benefit of legislative imprimatur, in specific instances have no relationship to the facts in this case and do not justify the relief the Government requests. The position Taxpayer advocates is fair and reasonable and the equity underlying Taxpayer's position is apparent. Certainly, all taxpayers who have voluntarily discharged their reporting obligations should be accorded the equal treatment that Congress intended.

For the above stated reasons the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner should be reinstated and affirmed.

LEGAL ARGUMENT

I. The underlying purpose of Section 6501 dictates that the limitations period commenced upon the filing of an honest and complete amended return.

This case rests entirely on the meaning and operation of a statute of limitations—specifically whether Subsection 6501(a) of the Code bars the assessment and collection of tax deficiencies more than three years after a taxpayer filed complete and honest amended tax returns. Subsection 6501(a) limits the period during which the Government may assess or institute an action to collect tax without assessment, to "3 years after the return was filed (whether or not such return was filed on or after the date prescribed.)"

Subsection 6501(a), which is the general rule, is augmented by several exceptions contained in Subsection 6501 (c). This dispute focuses on the operation of the exception set forth in Subsection 6501(c)(1) which provides "[i]n the case of a false or fraudulent return with the intent to evade tax, a proceeding in court for collection of such tax may be begun without assessment, at any time." The Government contends that this provision is controlling and that the filing of false or fraudulent original returns entitles it to an infinite period in which to assess, no matter what remedial steps the taxpayer undertakes.

On August 9, 1973, the Taxpayer voluntarily and at a time when it was not the subject of either a civil or criminal investigation by the Government (JA -56a) filed amended returns for the years 1967 and 1968. For purposes of these proceedings it has been assumed that the original returns filed by Taxpayer for the years 1967 and 1968 fell within the terms of Subsection 6501(c)(1) so that the statute of limitations contained in Subsection 6501 (a) did not begin running when those returns were filed.

The amended returns filed in August of 1973 were honestly made and corrected any errors (fraudulent or otherwise) in the original returns. The Government accepted Taxpayer's amended returns and the Taxpayer's remittance accompanying the returns but did not seek to assess or otherwise collect tax deficiencies until more than six years after Taxpayer filed the amended returns (JA -54a-55a). Petitioner submits that the three-year limitations period established by Subsection 6501(a) commenced to run when Petitioner provided the Government with complete, correct and accurate information as to the taxable events that occurred in 1967 and 1968, and thereby removed the bar previously imposed by the statutory exception of Subsection 6501(c)(1).

While the statutory exception in the instant case is Subsection 6501(c)(1), there is another relevant exception to the general rule enunciated in Subsection 6501(a). This other exception is significant since its interpretation sheds light on the purpose of the entire statutory scheme. This most important other exception is Subsection 6501(c)(3), which is directed at the failure to file a return. As is the case with the filing of a false or fraudulent return, when a taxpayer fails to file any return the Government is without the benefit of accurate facts relating to a taxpayer's income and expenses. Subsection 6501(c)(3) therefore provides in language that duplicates the exception of Subsection 6501(c)(1) that "[i]n the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Petitioner submits that just as the operative language of Subsections 6501(c)(1) and (c)(3) is identical, the purpose of the subsections is also identical and they should be interpreted consistently with one another and with the

purpose underlying statutes of limitation generally. Once a taxpayer has provided the information upon which the Government may make a knowledgeable assessment, the justification for suspending the limitations period is no longer viable and must yield to the favored policy of limiting the Government's time to proceed against the taxpayer. *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980); *Britton* v. *United States*, 532 F.Supp. 275 (D.Vt. 1981), *aff'd without opinion* (2d Cir. No. 816246, April 15, 1982); *Bennett* v. *Commissioner*, 30 T.C. 114, (1958), *acq.*, 1958-2 C.B. 3.

As this Court has stated, the major purpose of a statute of limitations is to:

> "assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965). *See also, Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 348-349 (1944); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 561 (1974) (concurring opinion).

Moreover, it has long been established that:

> Statutes of limitations are founded on sound policy. They are statutes of repose and should not be evaded by a forced construction. *Pillow* v. *Roberts*, 13 How. 472, 477 (1851). *See also, Clementson* v. *Williams*, 8 Cranch 72, 74 (1814).

The very same considerations of fairness led Congress to limit the period of time in which the Government may assess federal tax deficiencies. There has been no

manifestation of a Congressional policy in favor of an unlimited assessment period. *Bennett* v. *Commissioner*, 30 T.C. 114, 123-24 (1958), *acq.*, 1958-2 C.B. 3. Congress has determined that a taxpayer who has furnished the Government with a complete and honest return is entitled to repose after a finite period. After that period has elapsed, the taxpayer is assured that his tax liability cannot be reopened. *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304 (1940); *Mabel Elevator Co.* v. *Commissioner*, 2 B.T.A. 517, 519 (1925), *acq.*, VI-1 C.B. 4.

Just as Congress has granted to the taxpayer a limitations period based on sound principles of fairness, it has balanced that policy by affording the Government protection from taxpayer abuse. This is accomplished by depriving the errant taxpayer of the repose of the limitation period ordinarily granted when the taxpayer has deliberately failed to provide the information which would enable the tax authorities to detect errors and misstatements in taxpayer's return within the allotted period. Thus, the period of limitations enacted in Subsection 6501(a) of the Code is wholly suspended in the three circumstances set forth in Subsections 6501(c)(1), (c)(2) and (c)(3).[5]

Each exception contemplates conduct on the part of the taxpayer which deprives the Government of the accurate information necessary to determine the tax, either because the taxpayer did not file his return or filed a return in which the information was false and fraudulent. *See, e.g., Klemp* v. *Commissioner*, 77 T.C.

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[5] Subsection 6501(c)(2) permits the Government to assess at any time in the event of "a willful attempt in any manner to defeat or evade tax." By its terms, however, this exception is not applicable to the income tax.

201, 205-206 (1981) (reviewed by the entire court), *appeal docketed*, No. 81-7744 (9th Cir.); *Bennett* v. *Commissioner; Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 36 (1958).

The soundness of such an approach cannot be seriously contested. There exists no constitutional right to a statute of limitations. The enactment of such a statute is solely within the discretion of the legislature. Having successively enacted statutes of limitation in every Internal Revenue Code since 1921, Congress supplemented that general legislation on each occasion by additionally providing that no limitations period shall commence in the case of a taxpayer who filed a return that was intentionally false and misleading or who failed to file a return.[6] It is not a question of whether a statute of limitations has been tolled. Rather, Congress has decreed that the statute of limitations does not even start for that period during which the taxpayer has failed to provide the Government with accurate information.

The Government contends that the suspension of time provided in Subsection 6501(c)(1) lasts forever (or at least until the Internal Revenue Service makes an assessment). That construction is not only unfair to the individual taxpayer, but shortsighted in terms of the Government's own interest, in that it would dissuade taxpayers from voluntarily coming forth and filing amended returns. Petitioner submits, however, that Subsection 6501

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[6] *See* Sections 275 and 276 of the Internal Revenue Code as restated by Sections 277 and 278 of the Revenue Act of 1924; Sections 277 and 278 of the Revenue Act of 1926; Sections 275 and 276 of the Revenue Act of 1928; Sections 275 and 276 of the Revenue Act of 1932; Sections 275 and 276 of the Revenue Act of 1934; Sections 275 and 276 of the Revenue Act of 1936; Sections 275 and 276 of the Revenue Act of 1938. *See also* Sections 275 and 276 of the Internal Revenue Code of 1939 and Section 6501 of the Internal Revenue Code of 1954.

(c)(1) should be construed according to its purpose, i.e., to deny to the taxpayer the benefits of a statute of repose for that period during which he has failed to discharge his legal obligation of providing the Government with a complete and accurate statement of his income, deductions and credits.

As Justice Brandeis stated in *Florsheim Bros. Drygoods Co.* v. *United States,* 280 U.S. 453 (1930):

> "The burden of supplying by the return the information on which assessments were based was thus imposed upon the taxpayer. And, in providing that the period of limitations should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner." 280 U.S. at 460

The purpose of the Congressional enactment of exceptions to Subsection 6501(a) is consistent with the decision in *Florsheim Bros.* Until the taxpayer has discharged his obligation under law to provide the Government with a complete and accurate statement of his income and expenses, the Government's right to contest the taxpayer's calculations does not become subject to a limitations period. The bar to the Government's right to assess the taxpayer is indefinitely held in suspense, or as stated in the operative language of Subsections 6501(c)(1) and (3), the Government may assess or seek to collect the tax it claims due *"at any time."* When, however, the taxpayer does discharge his obligation by supplying the Government with the required information the limitations period begins running. As stated in *Bennett* v. *Commissioner:*

> "For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns." 30 T.C. at 123-24.

When, as in the instant case, the taxpayer files an honest return, be it amended or original, the Government has available to it all of the information that is required to allow it to assert its claim for any unpaid tax. Once the taxpayer has placed that information in the Government's hands, the justification for continuing the suspension of the limitations period loses its vitality, unless it can be shown that Congress intended the suspension of the limitation period as a punitive measure.

That suggestion was considered and rejected in *Klemp* v. *Commissioner; Dowell* v. *Commissioner; Britton* v. *United States; Bennett* v. *Commissioner.* Where Congress intended to impose punitive measures in the Code it has affirmatively done so in clear and precise language. Thus, in enacting Subsection 6653(b) of the Code, Congress imposed a 50% additional fraud penalty on the difference between the true tax liability and the amount shown on the original return. The taxpayer is subject to this fraud penalty upon the filing of a fraudulent return regardless of the filing of amended returns, provided the same is assessed within the statutory period. *See, e.g., George M. Still Inc.* v. *Commissioner,* 19 T.C. 1072, *aff'd.,* 218 F.2d 639 (2d Cir. 1955); *Eck* v. *Commissioner,* 16 T.C. 511 (1951), *aff'd.,* 202 F.2d 750 (2d Cir. 1953), *cert. denied,* 346 U.S. 822 (1953). Similarly, the criminal provisions of the Code are obviously punitive in nature and subject a taxpayer who has committed fraud to severe

sanctions whether or not he chooses to file an amended return, provided the Government has acted within the six year period of limitations. *See,* 26 U.S.C. §7201 *et seq.*

Any possible doubt concerning the non-punitive nature of Subsection 6501(c) is resolved by the fact that the suspension of the limitations period for a taxpayer who willfully and with intent to evade the tax fails to file a return terminates when the taxpayer files an honest return, even if that honest return is filed after commencement of a tax audit by the Government. *Bennett* v. *Commissioner.* It is undisputed that under such circumstances filing of the amended return results in the commencement of a period of limitations provided in Subsection 6501(a). *Bennett* v. *Commissioner.*

It is inconceivable that Congress would utilize the suspension of the statute of limitations as a punitive measure for persons who file a false or fraudulent return but not for persons who fraudulently attempt to evade the payment of tax by willfully failing to file any return at all. The distinction which the Government attempts to create between Subsections 6501(c)(1) and (c)(3) simply does not manifest itself in the legislative history.

From 1921 until the adoption of the 1954 Code the substance of those two subdivisions was included in one sentence of a single subsection of the income tax laws.[7]

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[7] *See, e.g.,* Section 276(a) of the Code which reads as follows:

> "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time"

The Committee Reports to the 1954 Code discuss the substantive changes to the 1939 Code provisions that were included in Section 6501 of the 1954 Code. S.Rept. No. 1622, 83d Cong., 2d Sess. 583-585 (June 18, 1954); H.R. Rept. No. 1337, 83d Cong., 2d Sess., A413-A414 (March 9, 1954). No mention is made in those Reports of the separation into two subdivisions of the "failure to file" exception and the "false or fraudulent return" exception. Surely the illusory distinction which the Government must press to support its position would have been commented upon by either the House or Senate at the time that this apparent clerical change had been enacted, had such a change been as significant as the Government erroneously contends. The absence of such commentary in the legislative reports is strong evidence that the separation was solely stylistic and was intended to make no substantive change in the law.

That Subsections 6501(c)(1) and 6501(c)(3) are in *pari materia* and are therefore to be read with reference to each other is not truly an issue. *See Dowell* v. *Commissioner.* Even the opinion of the Third Circuit Court of Appeals, where the majority declined to follow the holding in *Dowell* agreed that the "failure to file" exception and the "false or fraudulent return" exception are in *pari materia. Badaracco* v. *Commissioner,* 693 F. 2d 298, 301, n.6. The stated basis for the Third Circuit's departure from the reasoning of *Dowell* is the parenthetical phrase contained in Section 6501(a): "(whether or not such return was filed on or after the date prescribed)." The majority opinion concluded that the addition of that phrase in the 1954 Code indicated a Congressional intent to treat differently taxpayers who failed to file and those who filed fraudulent returns. Petitioner respectfully submits that such a conclusion is unwarranted.

As is the case of the separation of former Section 276(a) of the 1939 Code into two separate subsections, the pertinent legislative history makes no mention whatsoever of the purpose underlying the insertion into Subsection 6501(a) of the parenthetical phrase. In fact, no such commentary was necessary since the courts, even prior to enactment of the 1954 Code, consistently held that the limitations period set forth in the predecessor statutes to Subsection 6501(a) commenced running on the date when by law the return should have been filed or from the date when the return was actually filed, whichever is later. *See, e.g., Automobile Club* v. *Commissioner*, 353 U.S. 180 (1957) (returns filed on October 22, 1945 for 1943 and 1944 commenced period of limitations on filing date); *Helvering* v. *Campbell*, 139 F.2d 865 (4th Cir. 1944).

If Congress had intended the result espoused by the majority of the Third Circuit, they would have so stated. Moreover, if Subsection 6501(a) was meant to deal with the exception relating to a failure to file, there would have been no need to re-enact Subsection 6501(c)(3). Thus, to accept the reading of the statute espoused by the Court below would violate a basic maxim of statutory construction which presumes that every provision of a statute is intended for some useful purpose and a statute should not be read to render certain provisions superfluous. *United States* v. *Marubeni American Corp.*, 611 F.2d 763 (9th Cir. 1980); *United States* v. *Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972). It is clear that the parenthetical reference in Subsection 6501(a) was intended to assist the reader in ascertaining the meaning of that section and not to evince a different treatment of those taxpayers who failed to file (Subsection 6501(c)(3)) and those who filed a false or fraudulent return (Subsection 6501(c)(1)).

Moreover, the practical result of incorporating into the parenthetical phrase of Subsection 6501(a) the interpretation adopted by the Third Circuit in *Badaracco* v. *Commissioner* is excessively drastic. For, under the law as espoused by the Court below, a taxpayer who attempts to evade the tax by fraudulently failing to file a return can terminate the suspension of the limitations period by filing a return at a later date, even if that later date is after indictment and conviction for criminal violation of the tax law. But if the attempt to evade tax was effected by filing a false return, the taxpayer can never terminate the suspension of that period by filing an amended return or by any other means, even if he repents and files an amended return at a time when the Government has no indication whatsoever that there has been wrongful conduct on the part of the taxpayer.

The legal issue presented by this comparison is not whether it is desirable to permit wayward taxpayers to terminate the suspension period—there is no dispute that a suspension caused by Subsection 6501(c)(3) can be so terminated. Rather, the narrow question presented is whether Congress is likely to have intentionally provided such disparate consequences to acts which are distinguishable only by a factual difference that has no substantive relevance. The 33-year parallel history of the two suspension provisions as integrated parts of a single statutory sentence makes it clear that the Congressional intent is contrary to the construction urged by the Government.

Faced with its own acquiescence in the logic of the opinion in *Bennett* v. *Commissioner*, and the fact that there is really no substantive difference between a failure to file and the filing of a false or fraudulent return, the Government argued to the courts below that there exists a distinction between an honest but "delinquent" return and an honest "amended" return.

The linchpin for this argument is that there is no statutory authority for the filing of an amended return. Such a proposition is without merit and amounts to a major exaltation of form over substance. While it is true that Congress has never fully provided statutory authority for the filing of amended returns, it cannot be seriously contended that amended returns are not an integral part of the procedures established by the Government for the reporting and payment of taxes.[8]

It is not only the Government which has accepted and in fact embraced the concept of the amended return. The courts have consistently treated such documents as part of the nation's tax structure to an extent that it may be fairly stated that a body of common law has developed surrounding their use. *See, e.g., National Refining Co. of Ohio,* 1 B.T.A. 236 (1924), *non-acq.,* IV-1 C.B. 4; *John P. Alkire Inv. Co.* v. *Nicholas,* 114 F.2d 607 (10th Cir. 1940); *Kaltreider Construction Inc.* v. *Commissioner,* 129 F.Supp. 228 (D. Pa. 1961). Moreover, amended returns have even been used by the Government as the basis for prosecution of criminal charges. *Neaderland* v. *Commissioner,* 52 T.C. 532 (1969).

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[8] For example, *see* Treas. Reg §§ 301.6211-1(a) [taking the tax shown on the amended return into account in determining the amount of tax deficiency], 301.6402-3(a) [requiring a claim for refund to be made by filing an amended return], 1.1034-1 (i)(2) [requiring the filing of an amended return to show the amount of gain recognized on the sale of a residence where the taxpayer fails to reinvest all of the proceeds of sale to purchase a replacement residence], 1.453-8(d)(3) [permitting the use of an amended return to revoke an election to report income on the installment method]. *See also,* Rev. Rul. 82-81, 1982-1 C.B. 109; Rev. Proc. 79-13, 1979-1 C.B. 494. The Commissioner provides printed forms for amended returns (Form 1040X for individuals and Form 1120X for corporations).

The only distinction between an "amended" return and a "delinquent" return as it relates to the issue at bar is the label which the Government puts on it. In each instance, the document represents the taxpayer's honest effort to rectify an earlier fraudulent attempt to evade the tax. The information contained in each return is of the same nature and in each instance it is the means by which the taxpayer has sought to supply the Government with the information necessary to enable a proper assessment to be made of the taxes due.[9]

The weakness of the Government's position with respect to the distinction between "amended" and "delinquent" returns can be illustrated by the following hypothetical situation: Mr. B files a fraudulent return on April 15 (a Friday). Over the weekend he has a change of heart and files an honest "*amended*" return on the following Monday, April 18. According to the Government, since the document Mr. B has filed on April 18th is to be classified as an "amended" return, the statute of limitations for the assessment and collection of the tax which may be due thereunder never commences. On the other hand, if Mr. B, with the same intent to evade tax, decides on April 15th not to file a return and thereafter had the same change of heart, his filing on April 18th of what the Government chooses to classify as a "*delinquent*" return would entitle him to the benefit of the three year limitations period. The proposition is so patently illogical as to defeat itself. As Judge Wilbur noted in *Klemp* v. *Commissioner:*

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[9] It is conceded that in the instant case, the Government accepted Petitioner's amended returns when filed by Petitioner in August 1973 (JA -76a).

> "Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives three score and ten or as long as Methuselah. In most religions one can repent and be saved but in the peculiar tax theology of respondent no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reason of policy requires visiting this absurdity on the taxpayer." *Klemp*, 77 T.C. 201, 207 (concurring opinion).

Indeed, the effect of the Government's absurd proposition is not limited to the length of Mr. B's mortal existence. Under Subsection 6901(c)(1) of the Code, the Government can assess a liability against a transferee of Mr. B within 1 year after the expiration of the period of limitation for assessment against the transferor (Mr. B). Since, according to the Government's contention, there is no expiration of its power to assess against Mr. B, the one-year expiration period for assessing against his transferee will never commence to run. *See, Leo Kubik, Transferee*, 33 T.C.M. 302 (1974). Consequently, even years after Mr. B's death, the Government would not be barred from litigating such issues with the beneficiaries of B's estate or with the legatees of deceased beneficiaries. Such a result cannot be endorsed or sanctioned by this Court unless there exists the most explicit statement of Congressional policy dictating such a conclusion. No such statement of Congressional intent exists either in the legislative history or in the language of the statute itself. Therefore, the Government's contention that there exists a valid distinction between Subsections 6501(c)(1) and 6501(c)(3) for purpose of assessment must be rejected.

II. The language of Section 6501 expresses Congress' intent that the exception in Subsection 6501(c)(1) is applicable only so long as a false return is the only return filed, and that the three year limitation in Subsection 6501(a) commences upon the filing of an honest return.

The Third Circuit Court of Appeals found that Subsection 6501(c)(1) was, in essence, an unlimited statute of limitations. This contradiction in terms resulted from undue attention to three words in Subsection 6501(c)(1) —"at any time"—and a forced application of the "plain meaning" rule of statutory construction. The Court's attention did not focus on the plain meaning of the language employed in the remainder of Section 6501, nor the underlying intent of the statute.

Subsection 6501(c)(1) states:

> "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, *at any time*."

Taken literally, and without any reference to the remainder of the section, this subsection *may* be read as meaning that once the taxpayer has filed a fraudulent return there can never be a time limit for the Government to assess tax. However, a reading of the entire statute belies such an interpretation. Of course, the parallel subdivision, 6501(c)(3), contains the very same plain language—"at any time". Yet that very same language has been construed by the Tax Court to mean something entirely different and that construction was acquiesced in by the Government. *Bennett* v. *Commissioner*. Undaunted by the undeniable inconsistency of

its two positions, the Government presses a strained and unrealistic reading of Subsection 6501(c)(1).

The plain-meaning rule is in marked contrast to the controlling rule of construction that a statute must be interpreted according to its purpose, even if that requires the addition, deletion or substitution of language.[10] While many cases can be found where the plain meaning rule of construction is employed, more recent decisions of this Court have given greater weight and acceptance to the latter rule. *See e.g., Rose* v. *Lundy*, 455 U.S. 509, 516-518 (1982); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979). In *Chapman* the Court stated "[a]s in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." 441 U.S. at 608. In *Watt* v. *Alaska*, 451 U.S. 259 (1981), this Court recognized that any conflict between the two rules of construction must be resolved in favor of effecting Congressional intent notwithstanding the use of words which cause a contrary result when construed literally:

> "the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists . . . The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." 451 U.S. at 266.

Even the zealous adherents to a "plain-meaning" rule are likely to agree that the plain language cannot control if it leads to a result that Congress did not intend.

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[10] *Qui Haeret in Litera Haeret In Cortice* ("He who considers merely the letter of an instrument goes but skin deep into its meaning") Black's Law Dictionary 5th Ed. 1979.

While the plain-meaning approach in the instant case does not result in the height of absurdity related by Blackstone in his Commentaries,[11] a strict adherence to that doctrine can result in patent inconsistencies, the principal one being the disparity in treatment of taxpayers who fraudulently fail to file a return and taxpayers who file a fraudulent return. *Compare Bennett* v. *Commissioner with Badaracco* v. *Commissioner.* Moreover, such construction permits the Government to forever suspend a Sword of Damocles over a taxpayer who at one time may have filed a fraudulent return, but who has subsequently recanted and filed an amended return providing the Government with all the information necessary to properly assess the tax. No reasoned rule of law can justify this unbridled delay of the commencement of the statute of limitations, nor support a legal theory that in practice punishes a taxpayer, like the taxpayer herein, who recants prior acts of alleged misconduct, and voluntarily comes forth and provides the Government with the information it needs to assess any tax due.

The Taxpayer allegedly filed false tax returns. As a corporation its management was subject to change, and after the filing of allegedly false returns, management sought to voluntarily rectify the situation by filing amend-

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[11] To take a time-honored example, consider the construction of a law adopted in Bologna, Italy a few hundred years ago "that whoever drew blood in the streets should be punished with the utmost severity". A question arose as to whether the law called for the punishment of a surgeon who opened a vein of a person who had fallen down in the street in a fit. The literal or plain terms of the statute clearly applied to the surgeon's actions, but the language of the statute, when read in light of common experience, strongly suggests that it was not aimed at medical treatment provided by a surgeon. The statute was deemed not to apply. *See Blackstone's Commentaries,* Vol. 1, p. 61 (8th ed. 1778).

ed returns. Taxpayer acted voluntarily and without any coercion from the Government whatsoever. Taxpayer was not the subject of any criminal investigation, and there was no reason to believe that it would be indicted for criminal tax fraud.[12] (JA -56a) Taxpayer's filing of the amended returns was a voluntary act undertaken to rectify past errors in judgment. To subject the Taxpayer, or any other taxpayer who voluntarily comes forth and files an amended tax return, to open ended liability cannot have been intended by Congress. The Congressional intent is clear that once the Government is given the information it needs to determine the taxes, some reasonable period of limitation for the assessment of that tax must be imposed. That reasonable period of limitations—three years—was the one selected by Congress in Subsection 6501(a). This Congressional intent has been held to dictate that the three year statute is applicable to the taxpayer who, having fradulently failed to file, comes forth (voluntarily or otherwise) and files a tax return which provides the government with information it needs to assess the tax. *Bennett* v. *Commissioner*. There is no reason to assume that Congress intended inconsistent application of this statute as between fraudulent nonfilers, who recant and file delinquent returns, and fradulent filers, who recant and file amended returns.

The inconsistency of treatment urged by the Government cannot be shrugged off as merely a peculiarity of statutory law. Such an explanation may be accepted only if there is clear evidence that Congress intended such result. As noted previously, the legislative history relative to Subsection 6501(c) is completely silent. Appar-

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[12] At the time Taxpayer filed its amended returns, any claim of criminal wrongdoing for the tax year 1966 had been barred by the six year statute of limitations applicable to criminal misconduct, and the statute was about to run on tax year 1967. See Subsection 6531(a) of the Code.

ently the effect of the filing of an amended nonfraudulent return on the period of limitation is a matter which Congress did not anticipate and which it never addressed. These circumstances, which are not uncommon, require an examination of the policies underlying the enactment. As this Court stated in *Rose* v. *Lundy*:

> "In 1948, Congress codified the exhaustion doctrine in 28 U.S.C. Section 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion. Section 2254, however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise 'the question presented', but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legislative history of Section 2254, as well as the pre-1948 cases, contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) ('In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy' (citations omitted)); *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ('where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' (citations omitted)); *United States* v. *Sisson*, 399 U.S. 267, 297-298 (1970) ('The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances

> not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed'); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ('Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved.')." 455 U.S. at 516-18.

The policies underlying Section 6501 dictate against acceptance of an overly literal reading of Subsection 6501 (c)(1). Moreover, in this case there is no conflict between the plain meaning rule and a construction which relies on Congressional intent. For a reading of all of the language of Section 6501 reveals that Subsection 6501 (c)(1) is only an exception to the three-year limitation made generally applicable by subsection 6501 (a). In fact, all of Subsection 6501(c) is denominated in the body of the statute as "EXCEPTIONS—" to Subsection 6501(a). Thus, Subsection 6501(c)(1) is clearly not, as the Government would have this Court concluded, a self-contained statute of limitations, whose meaning can be ascertained from a reading of the Subsection without consideration of the plain meaning of the entire section. Rather, it is exactly what the plain language of the statute says it is, an "*exception*" to the limitation period provided in Subsection 6501(a).

Subsection 6501(c)(1) is not a statute of limitations. Congress expressly enacted it as an exception to the statute of limitations in Subsection 6501(a). It is the antithesis of a statute of limitations, which under specified circumstances only postpones the commencement of the three-year limitations period. Subsection 6501(c)(3) is of an identical nature to (c)(1), and for the most part contains identical language. It also is not a statute of lim-

itations, but rather an exception to the statute. As an antithesis of a statute of limitations, Subsection 6501 (c)(3), under circumstances slightly different than those to which (c)(1) must be applied, also only postpones the commencement of the limitation period. Subsection 6501 (c)(3) suspends the period of limitation "in case of failure to file a return". Thus, *so long as* there is a failure of the taxpayer to file a return, the Government may assess the tax "at any time". However, when the delinquent taxpayer files a return (voluntarily or otherwise), the exception to the general limitation period is no longer applicable, and the three year period of limitation begins to run. The Government has so conceded. *Bennett* v. *Commissioner*. Likewise, the exception to the general period of limitation in Subsection 6501(c)(1) is applicable *so long as* the taxpayer has only filed a false or fraudulent return. When the taxpayer files an amended return which reveals his actual income, deductions and credits, the provisions of Subsection 6501(c)(1) cease to be applicable, and the limitation period may no longer be postponed. Thus, under the over-all statutory scheme, once an honest delinquent or an honest amended tax return has been filed, the exceptions in Subsections 6501 (c)(1) and 6501(c)(3) to the general statute of limitations in Subsection 6501(a) cease to apply, and "[t]he tax cannot be assessed at any time under Section 6501(c) of the code, but must be assessed within the three-year period of limitation provided in Section 6501(a)." Rev. Rul. 79-178, 1979-1 C.B. 435.

The Government's so-called plain meaning construction of the language "at any time" is further eroded, when other uses of that very language are analysed. As previously indicated, in its acquiescence in *Bennett* v. *Commissioner* the Government implicitly conceded that "at any time" in Subsection 6501(c)(3) really means *so long as no*

delinquent return is filed. Thus the plain meaning of "at any time" may no longer be viewed as quite so plain.

Similarly, an overly literal construction of the words "at any time" was rejected by the Fifth Circuit in *Wolff* v. *United States*, 578 F2d 1103 (5th Cir. 1978), a case which involved the construction of another closely related subdivision, Subsection 6501(c)(2). That subdivision is yet another exception to 6501(a), and likewise postpones commencement of the running of the three-year statute "[I]n case of a willful attempt . . . to defeat or evade" taxes other than income, gift or estate taxes. In Subsection 6501(c)(2) the tax may also be assessed "*at any time*". This exception is almost identical to Subsection 6501(c)(1), since the (c)(2) requirement of willfulness and the (c)(1) requirement of intent are indistinguishable. In *Wolff* v. *United States* the Fifth Circuit considered the impact of the subsequent dissipation of the taxpayer's demonstrated willfulness, (i.e., intent) to evade tax, which willfulness existed at the time of the original filing. That Court determined that upon a filing of an amended return and a showing that the taxpayer's willful intent to evade tax had ended, the general three-year limitation would once again control. Thus in the case of another exception to Subsection 6501(a), the plain language "*at any time*", was held to really mean "*so long as the willful intent continues*", as demonstrated, for example, by the filing of an amended, nonfraudulent return. Clearly, the Fifth Circuit has recognized that "at any time" must not be given the literal construction urged by the Government herein.

The Government also attempts to justify its position by focusing on the unimportant, if not non-existent, issue of "original" returns as opposed to "amended" returns. The Government argues that once an original return is

filed, the parties' rights and obligations become fixed in stone and an unlimited statute of limitations becomes effective forever. The controlling determination is not whether a return is original or amended, but whether it is a return at all.

Initially, it must be noted that the terms "original" and "amended" do not appear in Section 6501.[13] Thus, when the Government contends that the controlling factor is whether a return is original or amended, it attempts to draw attention to a non-issue, rather than a determination of whether the returns fit within the descriptive terminology employed by the Congress.

In describing the documents which may be filed by a taxpayer, Section 6501 uses only the terms "the return", "false return" and "no return". The language in Subsections 6501(c)(1) and (3) which permits the tax to be assessed "at any time" must not be construed in conjunction with the words "original" and "amended" return,

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[13] In fact, the one provision of the Code which mentions "amendments" to returns, I.R.C. §6213(g)(1) (1976 & Supp. IV 1980) defines "return" for the purposes of §6213 as "any return, statement, schedule, or list, and any amendment or supplement thereto . . ." The legislative history indicates that this definition was included to insure that the Commissioner reviewed all supporting schedules for "mathematical errors" before assessing deficiencies through summary proceedings. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 289-93 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 375-387 (1976). Therefore nothing in the legislative history indicates that Congress explicitly excluded the acceptance of amended returns by the Internal Revenue Service. *See, e.g.* Treas. Reg. §§301.6211-1(a), .6402-1(a)(5) (1982). When the Government has accepted ameded returns, as in this case, the courts have given them effect. *E.g., United States* v. *Samara*, 643 F2d 701, 704 (10th Cir.) *cert. denied*, 454 U.S. 829 (1981); *Bookwalter* v. *Mayer*, 345 F2d 476, 480 (8th Cir. 1965).

as the Government submits, but rather in conjunction with those phrases which do appear in the statute.

When a taxpayer files a "return", the three-year limitation in Subsection 6501(a) is applicable. It is also quite clear that when the taxpayer files "no return," by operation of Subsection 6501(c)(3), the three-year statute does not commence to run. However, when he thereafter files a "return", the three-year limitation period commences. *Bennett* v. *Commissioner.* The reason for this is not, as the Government contends, that the delinquent return is an "original" return, but because it is a "return" which "evinces an honest and genuine attempt to satisfy the law". *Zellerbach Paper Co.* v. *Helvering,* 293 U.S. 172, 180 (1934). While that case involved circumstances which were distinguishable from those in the case at bar, Justice Cardozo's analysis and decision are particularly instructive, since he recognized that a return is a return for statute of limitations purposes when it evinces an "honest and genuine" endeavor to advise the Government of the taxpayer's true income, deductions, and credits. Concommitantly, when a purported return does not do so, it is a "false" return, *i.e.,* no return at all, for statute of limitations purposes. *See Dowell* v. *Commissioner.*

Reflecting on the language of the other exception to the general three year period of limitation, the "false return" (Subsection 6501(c)(1)), Justice Cardozo's analysis leads to the conclusion that the filing of a "false return" has no effect whatsoever on the period of limitation for assessment. By implication Justice Cardozo advised that a "false return", one which does not evince an honest intent to comply with the law, is no return at all. This is absolutely consistent with Webster's Dictionary, which defines the word "false" as: "counterfeit; not genuine or real; artificial." *Webster's New Twentieth Century Dictionary of the English Language* (Unabridged 2nd Edition (1971). Under

this definition a "false return", as the phrase was used by Congress in Subsection 6501(c)(1), refers to a "*counterfeit*" return; "*not a genuine*" return; "*not a real*" return. Thus, when Congress enacted the "false return" exception to the three-year limitation, it did so in recognition of the fact that, for limitations purposes, a "false return" by its commonly accepted definition is not a return. Likewise, by enacting (c)(1) as an exception to the general rule, Congress evidenced an equally clear intent that the filing of a "return", *i.e.*, an honest return, whether it is called an "original" return, a "delinquent" return or an "amended" return, triggers the three-year limitation period which is applicable to all honest returns.

In sum, the Government's reading of Section 6501 is inherently flawed as it requires for its fundamental validity the elevation of Subsection 6501(c)(1) to the status of a self-contained statute of limitations (albeit an unlimited one) standing separate, apart and different from the remainder of Section 6501. This argument was rejected by the Tenth Circuit in *Dowell*, the Second Circuit in *Britton* and by the entire Tax Court in *Klemp*, and is in direct contradiction with the holding in *Bennett*, and the Government's acquiescence therein. Furthermore, Congress could not have intended that it would make a difference if "the return" under Subsection 6501(a) is an amended return as opposed to a delinquent return; for in either case, the taxpayer who supplies the Government with information that satisfies *Zellerbach* has filed the return contemplated in Subsection 6501(a) and has satisfied the condition precedent for the commencement of the period of limitations. The contrary position espoused by the Government, that a taxpayer who files a fraudulent return forever foregoes the opportunity to file "the return" under Subsection 6501(a), is undermined by the totality of the language of Section 6501 and by the Government's acquiesence in *Bennett* v. *Commissioner*, and should not be accepted by this Court.

III. The policy contentions urged by the Government are unavailing

In its response to the Petition for a Writ of Certiorari and in the lower Courts, the Government pressed certain alleged "policy" considerations in support of its contention that it needed an open-ended assessment period. Two of these arguments focus on the internal mechanisms and procedures of the Internal Revenue Service, and the third such argument was based on Subsection 6501(e)(1) of the Code.

Each such consideration advanced by the Government is superficially attractive but does not withstand careful analysis. Moreover, each assertion of policy suffers from a fatal flaw, for each is as equally applicable to the situation presented in *Bennett* v. *Commissioner*, involving a fraudulent failure to file, as it is to the instant case. While the Government contends that its internal procedures may suffer if the position urged by Taxpayer is upheld by this Court, the Government cannot truly identify a single policy consideration which is persuasive enough to justify so disparate a treatment between the taxpayers in *Bennett* and the Taxpayer in the instant case.

Specifically, the three policy contentions which were cited with approval by the Third Circuit are: (1) the duality of civil and criminal proceedings; (2) the difficulty of proving fraud; and (3) the alleged anomalous treatment of taxpayers who omit substantial income from their returns, as opposed to those who file fraudulent returns. Petitioner shall address each of these *seriatim*.

1) The duality of civil and criminal proceedings.

The Government urges that upon the filing of a fraudulent return, it should be permitted to delay civil assess-

ment for that period of time during which criminal proceedings or investigations are pending (Respondent's Rule 22 Brief pp. 9-10). This policy argument has no application to the Petitioner or to the issues presented by this Petition, as Petitioner was *never* the subject of any criminal proceeding or investigation.

Although it has been previously stated, Petitioner must again point out that it came forward and voluntarily filed its amended returns without any pressure from the Government, prior to *any* action by the Government (JA - 56a).[14] There was no inquiry or investigation into Petitioner's tax returns prior to its voluntary filing of its amended tax return.[15] Petitioner suggests that a taxpayer who voluntarily comes forth and files an amended tax return, in an honest attempt to rectify past errors, should

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[14] In contrast, in *Bennett* v. *Commissioner*, the taxpayers, who intended to fraudulently evade payment of their taxes filed a delinquent return only after commencement of an audit by the Government. In *Dowell* v. *Commissioner*, the taxpayers were subject to criminal investigation before the amended returns were filed and were thereafter convicted under 26 U.S.C. §7206(1) of willfully filing false tax returns. *United States* v. *Dowell*, Cr.No. 70-85 (W.D.Okla., 1970), *aff'd.*, 446 F.2d 145 (10th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); in *Klemp* v. *Commissioner*, the taxpayers had been notified by the Government prior to the filing of their amended returns that their returns were to be audited. 77 T.C. at 202. Criminal convictions were also obtained against the taxpayers in *Britton* v. *United States*, and in the consolidated companion case to the instant proceeding, *Badaracco* v. *Commissioner*, 693 F2d at 300.

[15] The majority opinion of the Third Circuit in *Badaracco* v. *Commissioner* erroneously states with respect to Petitioner that "lengthy criminal and civil investigations" occurred following Taxpayer's filing of amended returns in August of 1973 (PA -4a). 693 F2d 300. That statement is unfounded and cannot find support in any portion of the record below.

not be subject to never-ending assessment to satisfy the Government's concern with its "policy" relating to the enforcement of the criminal tax statutes, especially when that policy is totally inapplicable to the taxpayer. Further, to afford such a taxpayer harsher treatment than that afforded to the taxpayer in *Bennett*, who willfully sought to evade his tax obligations by failing to file any tax returns, and then filed a delinquent return only after the commencement of a Government investigation, is neither reasonable nor rational.

Moreover, even as a general proposition the Goverment's argument is unavailing. The Government argues that once it refers a case for criminal prosecution it no longer has available to it the summons procedure authorized under Section 7602. *United States* v. *LaSalle National Bank*, 437 U.S. 298, 308-309 (1978). Therefore, it should be permitted to wait until resolution of the criminal proceeding before being required to commence its civil assessment procedure. This argument is wanting in several respects. Presumably the Internal Revenue Service does not refer a case to the Department of Justice for criminal prosecution until it has collected substantial evidence of fraud. Additionally, it must be noted that in any criminal proceeding for tax evasion the Government must necessarily prove the elements of the civil deficiency if it is to establish criminality.

The only real problem which the Government may face with respect to simultaneous criminal and civil proceedings is the opportunity presented to the taxpayer to obtain in the civil arena that which it could not obtain in the criminal proceeding. The problem, however, does not justify the extreme position espoused by the Government, i.e., that it be permitted to wait forever before instituting civil proceedings—particularly since the Government

is not without other remedies. The Government can request and in many instances the taxpayer will agree to extend the period of limitations under Subsection 6501 (c)(4). Moreover, even if the taxpayer refuses to agree to extend the limitations period the Government may properly seek relief from the courts. This is exactly what occurred in *Campbell* v. *Eastland,* 307 F.2d 478 (5th Cir. 1962). In *Campbell* the Government was party to a civil case while a criminal investigation was pending based on the same facts. The Fifth Circuit did not bar the civil proceeding nor did the Government ask that it do so. The Court of Appeals did, however, protect the Government against the danger upon which it premises this argument. Thus, the Court prevented the taxpayer from using the civil case as a means of obtaining discovery that could not have been obtained in the criminal proceeding. Petitioner submits that the holding in *Campbell* illustrates that the Courts can afford the Government ample means to prevent a taxpayer from abusing the civil process to obstruct criminal prosecution should such a case arise.

Moreover, the problem of which the Government complains is equally applicable when a taxpayer fails to file a return in order to defeat the tax. When such a taxpayer subsequently files his honest delinquent return, the three-year period of limitations commences to run notwithstanding that the Government may have elected to go forward with a criminal prosecution. *Bennett* v. *Commissioner.* Obviously the very same "policy" consideration present in the fraudulent failure to file situation is present in a false filing case. Indeed, the investigation in the false filing situation is likely to be more difficult since the Government does not have the benefit of two contradictory returns subscribed and sworn to by the taxpayer. Yet, the Government has already embraced the rationale of *Bennett* in Rev. Rul. 79-178, 1979-1 C.B. 435.

Petitioner submits that the Government's inconsistent positions strongly indicate that its concerns with respect to the difficulties of simultaneous civil and criminal proceedings are simply not persuasive.

2) The difficulty of proving fraud.

The Government contends that because it must prove fraud in a civil case by clear and convincing evidence, it should not be limited to a three year period for civil assessment after a non-fraudulent amended return is filed. The Government further contends that its burden is not significantly reduced when it receives an accurate amended return for the taxpayer (Respondent's Rule 22 Brief p. 10).

The validity of the Government's assertion suffers from the rather obvious fact that upon the filing of an amended return, the Government has the benefit of an honest return which it can compare and contrast with the original fraudulent return. The contrast between the amounts set forth in the fraudulent return and the modification made by the amended return typically will be of considerable aid to the Government in meeting its burden of proof, even in a criminal proceeding where the Government's burden is even greater. For example, in *United States* v. *Rischard*, 471 F.2d 105 (8th Cir. 1973), the taxpayer's amended returns were utilized by the Government to prove a pattern of consistent understatement of income which was held to be "persuasive evidence of willful intent" 471 F.2d at 107.

What truly undermines the Government's argument, however, is its very position as expressed in Rev. Rul. 79-178, 1979-1 C.B. 435. This ruling re-stated the Tax Court's decision in *Bennett* v. *Commissioner*. The facts presented in that ruling were as follows:

> "The taxpayer willfully failed to file a 1974 tax return in order not to pay income tax due. During the Service investigation, the taxpayer filed a correct, but delinquent, 1974 return on June 1, 1976. On completion of its investigation, the Service determined that the taxpayer was subject to the civil fraud penalty under section 6653(b) of the Code for failure to pay tax."

The Government's holding was as follows:

> "The tax cannot be assessed at any time under section 6501(c) of the Code, but must be assessed within the three-year period of limitations provided in section 6501(a)."

Petitioner submits that the Government's own ruling is dispositive of this argument. In case of a false filing the burden of proving fraud obviously is reduced to some extent due to the simple fact that the Government has in its possession two separate contradictory documents, each subscribed to by the taxpayer. In the situation presented in *Bennett*, and reflected in the above ruling, the Government has only the single document, the "delinquent" return. Unquestionably the Government's problem in establishing the requisite intent to defraud by clear and convincing evidence is even greater when it has only one return than in the case where it has two conflicting returns. Petitioner cannot explain the basic inconsistency in this approach and submits that neither can the Government.

3) The six year limitations period of Subsection 6501 (e) (1)(A).

The Government has also put forth a supposed policy argument based upon Subsection 6501(e)(1)(A) which provides that a taxpayer who omits an amount in excess of twenty five percent of his gross income from his return is subject to a six-year period of limitations. The courts have held that this period is not reduced by the filing of an amended return. *Houston* v. *Commissioner*, 38 T.C. 486 (1958); *Goldring* v. *Commissioner*, 20 T.C. 79 (1958). The Third Circuit noted the application of Subsection 6501(e)(1)(A) and concluded that it would be inappropriate for persons who filed an allegedly fraudulent return to be placed in a "better" position than those who made a substantial but non-fraudulent omission on their returns. *Badaracco* v. *Commissioner*, 693 F.2d at 302.

This conclusion ignores essential considerations. Subsection 6501(e)(1)(A) is not an exception to the three year limitation contained in Subsection 6501(a). Rather, it is a self-contained substitute statute of limitations and has no relationship to Subsection 6501(a) or 6501(c). *Klemp* v. *Commissioner*, 77 T.C. at 206. In fact Subsection 6501(e) expressly provides that it does not apply whenever one of the exceptions of Subsection 6501(c) is involved.

In its original decision in *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), *rev'd*, 614 F.2d 1263 (10th Cir. 1980) the Tax Court placed significance on its holdings in *Goldring* v. *Commissioner*, and *Houston* v. *Commissioner*, in which the returns contained an omission of more than 25% of gross income. In each case the Tax Court held that the subsequent filing of an amended return not containing such an omission did not shorten the already existing limitations period under the statutory predecessor

of Subsection 6501(e)(1)(A). The Tax Court held that the amended returns could not "relate back" to the original returns and shorten the special lengthened assessment period that began upon the filing of such returns. In neither case, however, did the Court consider the question of whether the filing of amended returns could begin the three year period of limitations under the predecessor to current Subsection 6501(a). The rejection of the position urged by the taxpayers in *Goldring* and *Houston* was based upon the theory that its adoption might deprive the Government of the full statutory period to review a return. That is definitely not a danger in the instant case, for there is no doubt that the Government had the benefit of the full three year period provided under Subsection 6501(a) to review and assess after the filing of Taxpayer's amended returns.

Further, the distinction which is ignored by the Government, between filing an amended return for purposes of Subsection 6501(e)(1)(A) and Subsection 6501(c), is basic. In the former situation the filing of an amended return would *shorten* a statute of limitations which is already running. In the latter situation, the period of limitations has not commenced since a fraudulent return or a failure to file commences nothing. By filing a non-fraudulent "delinquent" or "amended" return, the taxpayer does not alter an extant limitations period. Rather, the taxpayer seeks to start a period of limitations.

Another major consideration which the Third Circuit ignored is the extremely drastic penalties which may be visited upon a taxpayer who files a fraudulent return or fraudulently fails to file. Had these been considered there could be no justification for the statement that a taxpayer who files a return for which Subsection 6501(e)(1)(A) is applicable is in a better position than one who files

a fraudulent return under Subsection 6501(c)(1). As already noted, the taxpayer who omits 25% of income from his return does have the benefit of a statute of limitations. The taxpayer whose return is subject to Subsection 6501(c)(1) receives no such benefit. Only when such a taxpayer files an honest and complete amended return, does he receive that limited benefit. But the filing of the amended return does not remove the possibility of criminal prosecution or the imposition of the 50% civil fraud penalty. Indeed, the very act of filing amended returns has probably heightened such possibilities.

The overwhelming severity of indictment and conviction for tax fraud need no elaboration. Even if the taxpayer files the amended returns subsequent to the expiration of the six-year statute of limitations for criminal prosecution, he has given the Government strong evidence to press the imposition of the 50% civil fraud penalty available under Section 6653(b). The severity of this sanction is highlighted by the fact that if fraud is found to exist in any part of the return, the civil fraud penalty applies to the entire deficiency, *Goldberg* v. *Commissioner*, 239 F.2d 316 (5th Cir. 1956), and the penalty even survives the taxpayer's demise, *Kirk* v. *Commissioner*, 179 F.2d 619 (1st Cir. 1950).

Petitioner submits that the so called policy considerations advanced by the Government are illusory. Moreover, even were they persuasive, they must yield to basic overriding concerns. Despite the vast bureaucratic machinery available to the Government, it is beyond doubt that the tax system of the United States is for the most part dependent upon voluntary self-assessment by its taxpayers. *Lucia* v. *United States*, 474 F.2d 565 (5th Cir. 1973). In the case at bar, a voluntary self-assessment resulted in Taxpayer coming forth and filing its amended

return, giving the Government all the information it needed to assess any tax due. For over six years after the filing of these returns, the Government took no action to assess the tax. Then, after that considerable period of time had passed, the Government sought to assess the tax, saying in effect to Taxpayer—since your alleged wrongdoing was the filing of a false tax return instead of attempting to evade the tax by fraudulently failing to file, you are not entitled to avail yourself of the general statute of limitations provided by Congress to all taxpayers who give the Government the information it needs to assess, even though you came forward voluntarily and filed your amended return without any pressure from us. The enunciation of such a policy by the Government not only results in punishment for those who reassess their prior acts and voluntarily come forth and file amended returns, but also places a premium on silence —elevating one form of tax fraud over another—for it suggests to those citizens who would commit tax fraud that it is better to remain silent and gamble on nondetection than to repent and confess all by filing an amended return.

If Taxpayer has initially run afoul of its duty of self-assessment, Congress has provided the most severe sanctions to penalize such conduct. Those sanctions are embodied in the penal provisions of the Internal Revenue Code, and in the imposition of the fraud penalty under Section 6653(b). The Government seeks to add yet another penalty without the slightest indication that Congress intended to do so. The Government would consign Taxpayer to the never ending limbo of a period for governmental assessment that lasts until eternity and beyond.

CONCLUSION

Petitioner submits that for the reasons hereinabove stated the filing of an honest amended tax return commences the running of the statute of limitations provided in Subsection 6501(a). Therefore, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner be reinstated and affirmed.

Respectfully submitted,

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Nos. 82-1453 and 82-1509

In the Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides, as a general rule, that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * *." Section 6501(c)(1) sets forth an exception to the general rule applicable "[i]n the case of a false or fraudulent return with the intent to evade tax," providing that, in such cases, "the tax may be assessed * * * at any time."

The question presented is whether, notwithstanding Section 6501(c)(1), a taxpayer who has filed a false or fraudulent return for a particular year may, by later filing a nonfraudulent amended return for that year, secure the benefit of the normal three-year limitations period running from the date the amended return is filed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Constitution, statutes and regulations—Continued: Page

Internal Revenue Code of 1954 (26 U.S.C.):

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (P. Pet. App. 4a-20a; D. Pet. App. 1a-17a)[1] is reported at 693 F.2d 298. The opinion of the Tax Court in No.

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[1] "B. Pet. App." refers to the appendix accompanying the petition in the *Badaracco* case. "D. Pet. App." refers to the appendix accompanying the petition in the *Deleet* case.

82-1453 (B. Pet. App. 21a-27a) is unofficially reported at 42 T.C.M. (CCH) 573. The opinion of the district court in No. 82-1509 (D. Pet. App. 1d-5d) is reported at 535 F. Supp. 402.

JURISDICTION

The judgment of the court of appeals (B. Pet. App. 2a-3a; D. Pet. App. 1b-2b) was entered on November 29, 1982. Petitions for rehearing were denied on December 20, 1982 (B. Pet. App. 1a) and on December 23, 1982 (D. Pet. App. 1c-2c). The petitions for writs of certiorari were filed on February 24, 1983 (No. 82-1453) and March 11, 1893 (No. 82-1509). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6501, 6503 and 6653 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 1a-5a).

STATEMENT

a. *No. 82-1453.* Petitioners Ernest Badaracco, Sr., and Ernest Badaracco, Jr., were partners in an electrical contracting business. They filed individual and partnership tax returns for 1965 through 1969; they concede that those returns fraudulently understated their income (B. Pet. App. 23a; J.A. 35a-37a). On August 17, 1971, after federal grand juries had subpoenaed the partnership's records, petitioners filed nonfraudulent amended returns for each year in question (B. Pet. App. 7a, 24a). Three months later, petitioners were indicted for filing false and fraudulent tax returns in violation of Section 7206(1) of

the Code.[2] Each pled guilty to the charge of filing a false and fraudulent partnership return for 1967, and a judgment of conviction was entered on June 6, 1973. *United States* v. *Badaracco*, Crim. No. 766-71 (D.N.J.). The remaining 14 counts of the indictment were dismissed (B. Pet. App. 7a, 24a).

On November 21, 1977, the Commissioner of Internal Revenue mailed notices of deficiency to petitioners for each year, asserting liability under Section 6653(b) for additions to tax ("penalties") on account of fraud (J.A. 5a-7a). Petitioners sought redetermination of the deficiencies in the Tax Court, contending that the Commissioner's action was barred by the statute of limitations. Petitioners stipulated that the underpayments of tax reflected on their original returns for 1965 through 1969 were, in fact, due to fraud (J.A. 35a-37a). Yet they contended that Section 6501(c)(1), which permits the Commissioner to assess taxes "at any time" in the case of fraudulent returns, did not apply. In petitioners' view, their 1971 filing of nonfraudulent amended returns triggered operation of the general three-year statute of limitations specified in Section 6501(a). Because the Commissioner failed to send the deficiency notices within three years of the date their amended returns were filed, petitioners argued, assessment of the fraud penalties was barred. The Tax Court, following its decision in *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.), agreed with petitioners. B. Pet. App. 21a-27a.[3] Ac-

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[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

[3] In *Klemp*, the Tax Court, in a reviewed decision with five judges dissenting, overruled its prior holding in *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), rev'd, 614 F.2d 1263

cord, *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), rev'd, 614 F.2d 1263 (10th Cir. 1980), petition for cert. pending, No. 82-1873; *Britton* v. *United States*, 532 F. Supp. 275 (D. Vt. 1981), aff'd mem., 697 F.2d 288 (2d Cir. 1982) (table).

b. *No. 82-1509.* Petitioner Deleet Merchandising Corp. ("Deleet") filed timely corporate income tax returns for 1967 and 1968; these returns failed to report certain receipts derived from its printing supply business. On August 9, 1973, Deleet filed amended returns for 1967-1968 disclosing the unreported receipts (J.A. 57a-70a).[4] After the completion of criminal and civil investigations stemming from disclo-

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(10th Cir. 1980), that the unlimited assessment period specified in Section 6501(c)(1) continues to apply in such circumstances.

[4] Deleet asserts (D. Br. 6, 27) that its amended returns were "completely accurate" and that it acted "voluntarily and without any coercion from the Government whatsoever." The Commissioner, however, has asserted additional deficiencies in tax for 1967-1968, beyond the amounts shown as due on Deleet's original and amended returns, and Deleet's correct tax liability has not yet been determined. And while it is not material here whether the amended returns were, in fact, voluntarily submitted, the examining agent's audit report, which was filed with the district court, indicates that Deleet amended its returns only after one Martin Windell, a former corporate officer, had threatened to disclose to the Internal Revenue Service an alleged scheme by Deleet's officers to divert corporate profits to themselves. See Defendant's Answers to Plaintiff's First Set of Interrogatories, Exh. 1, pp. 1-2. Although Deleet has not conceded that its original returns were fraudulent, both the district court (D. Pet. App. 4d) and the Third Circuit (D. Pet. App. 3a n.3) assumed, for purposes of Deleet's summary judgment motion, that they were. The same assumption should govern disposition of the case in this Court.

sures made by certain of Deleet's officers,[5] the Commissioner, on December 14, 1979, issued a notice of deficiency to the company (D. Pet. App. 4a; J.A. 71a). The notice asserted deficiencies in tax and fraud penalties for 1967 and 1968.[6]

Deleet paid the disputed amounts and brought suit for a refund in the United States District Court for the District of New Jersey. On motion for summary

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[5] These investigations focused on allegations that corporate receipts had been diverted to company employees. See p. 4 n.4, *supra*. Deleet itself was not charged with criminal tax violations, nor was a formal criminal investigation initiated as to it. On March 6, 1976, however, a two-count information was filed against Martin Windell, a former officer and shareholder, charging him with omitting from his 1969-1970 individual tax returns substantial sums that had been diverted from the company. Mr. Windell pled guilty to one count of violating Section 7201 (governing willful attempts to evade or defeat tax); the second count was dismissed. See *United States* v. *Windell*, Crim. No. 76-96 (D.N.J. May 28, 1976). Contrary to Deleet's assertion, Br. 36 n.15, the record in this case reflects these matters. See Defendant's Answers to Plaintiff's First Request for Production of Documents, Exh. 1, pp. 2, 7-8; Defendant's Answers to Plaintiff's First Set of Interrogatories, Exh. 1, pp. 1-2, 6-7, 9, 47. At all events, this Court may take judicial notice of the related court proceedings. See *Bryant* v. *Carleson*, 444 F.2d 353, 357-358 (9th Cir.), cert. denied, 404 U.S. 967 (1971).

[6] On the same date, the Commissioner sent deficiency notices to several of Deleet's officers, asserting deficiencies in tax and liability for civil fraud penalties against them. See *Kramer* v. *Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Liroff* v. *Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Derfel* v. *Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Liroff* v. *Commissioner*, 44 T.C.M. (CCH) 47 (1982). Following its decision in *Klemp*, the Tax Court in each case held that assessment of the deficiencies and fraud penalties was barred by the three-year statute of limitations.

judgment, Deleet contended that the Commissioner's action was barred by the statute of limitations. It argued, as petitioners had argued to the Tax Court in *Badaracco*, that no deficiencies or penalties could be assessed more than three years after its amended returns were filed, regardless of whether its original returns were fraudulent. The district court agreed, likewise relying on *Dowell* and *Klemp*, and granted summary judgment in favor of Deleet. D. Pet. App. 1d-5d.

c. *The appeals.* The government appealed to the Third Circuit from the Tax Court's decision in No. 82-1453 and from the district court's judgment in No. 82-1509. The cases were heard together and decided in a single opinion by the court of appeals, which reversed in both cases, one judge dissenting. B. Pet. App. 4a-20a; D. Pet. App. 1a-17a.

The majority reasoned (B. Pet. App. 9a) that Section 6501(c)(1) on its face permits the Commissioner, "[i]n the case of a false or fraudulent return with the intent to evade tax," to assess the tax, or to proceed in court without an assessment, "at any time." The court found nothing in the Code, its legislative history, or the Treasury Regulations to suggest that taxpayers who had filed fraudulent returns could thereafter secure, by filing amended returns or otherwise, the benefit of the general three-year limitations period. While rejecting petitioners' argument that questions of statutory construction should be answered by reference to "tax policy," the court observed (B. Pet. App. 10a-13a) that substantial policy considerations in fact supported a literal reading of the statute. The court noted that Congress has charged the Commissioner with the duty of proceeding both criminally and civilly against taxpayers

who file fraudulent returns, and it found "strong reasons for believing that a three year limitations period is not adequate to permit the Commissioner to meet his dual responsibility." B. Pet. App. 12a-13a. Accord, *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983) (per curiam), petition for cert. pending, No. 82-2008. The dissenting judge expressed agreement with the Tenth Circuit's decision in *Dowell* and stated that, in his view, the Commissioner has no need for an unlimited assessment period once an amended return has been filed that provides "all the information required by law" (B. Pet. App. 18a).

SUMMARY OF ARGUMENT

These cases involve construction of the statute of limitations on tax assessments. Section 6501(a) ordinarily requires the Commissioner to assess the tax within three years after a return is filed. Section 6501(c), however, lists several situations in which the tax may be assessed "at any time." One of these situations, specified in Section 6501(c)(1), is a "case of a false or fraudulent return with the intent to evade tax." The question presented here is whether, under circumstances where a taxpayer has filed a false or fraudulent return, but has thereafter filed a nonfraudulent amended return, the timeliness of the Commissioner's assessment is governed by the general three-year limitations period of Section 6501(a) or by the unlimited assessment period of Section 6501(c)(1).

1. The court of appeals correctly held that the Commissioner is entitled to the continued benefit of Section 6501(c)(1) in such circumstances. The language of that Section, permitting assessment "at any time" in the case of fraudulent returns, is unqualified

on its face. Nothing in Section 6501(c)(1) or its legislative history suggests that a fraudulent filer can "call off" its operation by filing an amended return, or by otherwise repenting of his fraud. Since statutes of limitations "must receive a strict construction in favor of the Government," *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924), the plain language of the statute should govern the outcome here.

The natural reading of the statutory language is strongly supported by the overall structure of the Code's limitations provisions. The Code nowhere explicitly provides for the filing of amended returns, and Congress is thus unlikely to have intended that they would affect the operation of Section 6501. Until the Tenth Circuit's decision in *Dowell*, this Court and the lower courts had consistently held, in a variety of situations, that the application of the limitations provisions turns on a taxpayer's original, and not his amended, returns. Petitioners' proposed statutory construction, moreover, produces anomalous results when its impact on other portions of Section 6501 is considered.

The natural reading of the statutory language is likewise supported by the substantive operation of the fraud provisions themselves. It is well established that a taxpayer does not, by subsequent repentance, immunize himself from liability for a fraudulent filing. If an amended return does not bar the imposition of the fraud penalty, it should not cut short the time within which that penalty may be assessed.

2. Petitioners do not seriously dispute that a literal reading of Section 6501 supports the court of appeals' holding. Rather, they urge a nonliteral reading of the

statute on grounds of equity and tax policy. They contend that the Commissioner no longer needs an unlimited assessment period once he has the information that a nonfraudulent amended return provides him.

The court of appeals correctly held that strong policy reasons in fact support a literal reading of the statute. Fraud is difficult to investigate, and the Commissioner must bear the burden of proving it. While an amended return may evidence an underpayment of tax, it does not, standing alone, constitute an admission of fraud. Amended returns, moreover, come with no special guarantee of trustworthiness; the information they furnish must be investigated no less thoroughly than other post-return information provided by a taxpayer or third parties. Most importantly, the Commissioner has a duty to proceed both criminally and civilly against taxpayers who file fraudulent returns. Once a case has been referred to the Justice Department for criminal prosecution, the Commissioner, for reasons of policy and practicality, will generally find it difficult to complete his civil audit within the normal three-year period, and the filing of an amended return will make no difference in this respect.

3. In an effort to find some textual support for their proposed statutory construction, petitioners contend that their fraudulent original returns should be deemed "nullities," *i.e.*, "non-returns," for purposes of Section 6501(a), and that their amended returns are thus the only "returns" for the taxable years in question. But there is no authority for the proposition that a return which purports on its face to be a return is a "nullity" merely because it is fraudulent. Indeed, Section 6501(c)(1) itself uses the phrase,

"false or fraudulent return," plainly indicating that such documents are "returns" for statute-of-limitations purposes.

4. Finally, petitioners object to a literal reading of the statute because it produces a "disparity in treatment" as between fraudulent filers and fraudulent non-filers. It is settled that the normal three-year limitations period begins running when a taxpayer submits a late-filed return, regardless of whether his failure to file timely was due to fraud. Petitioners contend that the result should be the same when a taxpayer who has filed a fraudulent return later submits an honest amended one.

The plain language of the statute, however, mandates different results in these two situations. Section 6501(c)(3) permits assessment at any time "[i]n the case of failure to file a return." That section thus becomes inapplicable by its terms once a return is filed. Section 6501(c)(1), by contrast, applies indefinitely when a fraudulent return has been submitted, since the case remains a "case of a false or fraudulent return" regardless of the taxpayer's later conduct. Congress simply did not distinguish, for limitations purposes, between fraudulent and non-fraudulent failures to file, whereas it separately addressed the problem of fraudulent returns in Section 6501(c)(1).

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT, WHERE A TAXPAYER FILES A FALSE AND FRAUDULENT INCOME TAX RETURN FOR ANY YEAR, THE TAX FOR THAT YEAR MAY BE ASSESSED OR COLLECTED AT ANY TIME, REGARDLESS OF WHAT STEPS THE TAXPAYER MAY LATER TAKE

These cases involve the proper construction of the statute of limitations on tax assessments. It has long been established that statutes of limitations restricting the assertion of federal rights "must receive a strict construction in favor of the Government." *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924). This principle has special force as applied to federal tax claims. This Court has stressed "[t]he necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation." *Lucas* v. *Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930). The courts of appeals have repeatedly held that statutes barring collection of federal taxes "are strictly construed in favor of the government" and that "their applicability will not be presumed in the absence of clear congressional action." *McDonald* v. *United States*, 315 F.2d 796, 801 (6th Cir. 1963). See, *e.g.*, *Lucia* v. *United States*, 474 F.2d 565, 570 & n.14 (5th Cir. 1973) (citing cases).

A. The language of Section 6501(c)(1) unambiguously permits assessment at any time in the case of a false or fraudulent return, and this natural reading of the statutory language comports with the overall structure and operation of the Code's limitations provisions

1. The statutory scheme governing limitations on tax assessments is outlined in Section 6501 of the Code. Section 6501(a) sets forth the general rule

establishing a three-year period of limitations on the assessment and collection of any tax. It states: "Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Section 6501(e)(1)(A) sets forth an extended limitations period in situations where a taxpayer's return nonfraudulently omits more than 25% of his gross income, permitting assessment in such cases "at any time within 6 years after the return was filed." Both the three-year rule and the six-year rule, however, are explicitly made inapplicable in circumstances covered by Section 6501(c).

Section 6501(c) identifies three situations in which the Commissioner is allowed an unlimited period within which to assess tax. Section 6501(c)(1) provides: "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time." Section 6501(c)(3) provides that, "[i]n the case of failure to file a return, the tax may be assessed * * * at any time." And Section 6501(c)(2) sets forth a similar rule in the case of willful attempts to evade or defeat taxes other than income, estate, and gift taxes.[7]

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[7] A question as to the application of Section 6501(c)(2) similar to that presented here was considered, but not decided, by the Fifth Circuit in *Woolf* v. *United States*, 578 F.2d 1103, 1106 (1978). Contrary to Deleet's contention (D. Br. 31), the Fifth Circuit in *Woolf* did not reject "an overly literal construction" of the statute. Indeed, the Fifth Circuit has since ruled in favor of the Commissioner on the precise question reserved in *Woolf* and presented here. See *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983), petition for cert. pending, No. 82-2008.

The instant cases are squarely controlled by the unambiguous language of Section 6501(c)(1). Petitioners concededly filed (or are deemed for purposes of decision to have filed) "false or fraudulent return[s] with the intent to evade tax." Section 6501(c)(1), allowing the tax to be assessed "at any time" in such circumstances, is unqualified on its face. Nothing in the statute or its legislative history can be construed to "call off" its operation in light of a fraudulent filer's later conduct.[8] Nor is there anything in Section 6501(a) that enables a taxpayer to reinstate its general, three-year limitations period by filing an amended return. Indeed, as discussed more fully below (pp. 31-32, *infra*), the Code does not explicitly provide either for a taxpayer's filing, or for

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[8] The filing of a false or fraudulent return has, under every income tax statute since 1918, indefinitely extended the period of limitations for assessment of tax. See, *e.g.*, Revenue Act of 1924, ch. 18, § 250(d), 40 Stat. 1083 ("In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due"); Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265 ("[I]n the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined * * * at any time after it becomes due * * *"). See generally 10 J. Mertens, *Law of Federal Income Taxation* § 57.36 (1976). The legislative history is sparse. The Senate Report accompanying Section 276(a) of the Revenue Act of 1934, ch. 277, 48 Stat. 745, states Congress's intention that the Commissioner be permitted to assess the tax "without regard to the statute of limitations" in the case of a fraudulent return. S. Rep. No. 558, 73d Cong., 2d Sess. 43 (1934). Reports from earlier years are silent on the provision or simply repeat the statutory language. *E.g.*, H.R. Rep. No. 767, 65th Cong., 2d Sess. 34-35 (1918); S. Rep. No. 275, 67th Cong., 1st Sess. 21, 32 (1921); H.R. Rep. No. 179, 68th Cong., 1st Sess. 26 (1924).

the Commissioner's acceptance, of amended returns, which are creatures of administrative origin. Thus, when Congress provided for assessment at any time "[i]n the case of a false or fraudulent return," Congress plainly meant "[i]n the case of a false or fraudulent [*original*] return"—precisely the situation here. Until the Tenth Circuit's decision in *Dowell*, the courts had consistently held, in decisions dating to the earliest years of the federal income tax, that the operation of Section 6501 and its predecessors turns on the nature of the taxpayer's original, and not his amended, returns.[9] These decisions, like the decision below, properly accorded the statute its plain—indeed, its only reasonable—construction.

2. The conclusion that Section 6501(c)(1) permits assessment "at any time" in fraud cases, regardless of a taxpayer's later repentance, is confirmed by the substantive operation of the fraud provisions themselves. It is well established that a taxpayer who sub-

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[9] The courts had uniformly held, for example, that the filing of an amended return does not serve to extend the period within which the Commissioner may assess a deficiency. *E.g.*, *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934); *National Paper Products Co.* v. *Helvering*, 293 U.S. 183 (1934); *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924). The courts had also held that the filing of an amended return does not serve to reduce the period within which the Commissioner may assess taxes where the original return omits enough income to trigger the operation of the extended (now, six-year) limitations period provided by Section 6501(e) or its predecessors. *Houston* v. *Commissioner*, 38 T.C. 486 (1962); *Goldring* v. *Commissioner*, 20 T.C. 79 (1953). And the courts had held that the statute of limitations for filing a refund claim under the predecessor of Section 6511(a) begins to run on the filing of the original, not the amended, return. *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366, 368 (3d Cir.), cert. denied, 371 U.S. 877 (1962).

mits a fraudulent return does not, by subsequent voluntary disclosure, thereby purge the fraud inherent in his prior act; the fraud was committed, and the offense completed, when the original return was prepared and filed. See, *e.g.*, *United States* v. *Habig*, 390 U.S. 222 (1968); *Plunkett* v. *Commissioner*, 465 F.2d 299, 302-303 (7th Cir. 1972); *Swallow* v. *United States*, 307 F.2d 81 (10th Cir. 1962).[10] Once a fraudulent return has been filed, in short, the case remains a "case of a false or fraudulent return," regardless of the taxpayer's later conduct, for purposes of criminal prosecution and civil fraud liability under Section 6653(b). The case should likewise remain a "case of a false or fraudulent return" for purposes of the unlimited assessment period provided by Section 6501(c)(1). As Judge Parker of the Tax Court wrote in her *Klemp* dissent, "[if] the filing of a nonfraudulent amended return does not bar the imposition of the fraud penalty itself, * * * it should not cut short the time within which that penalty may be assessed." 77 T.C. at 211-212 (Parker, J., dissenting).

3. Petitioners suggest that Section 6501(c)(1) should be read merely to "suspend" commencement of

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[10] This well-established principle was recognized by the dissenting judge below (B. Pet. App. 19a n.7) and by the Tax Court in *Klemp* (77 T.C. at 206 n.9). As the Tax Court explained in *George M. Still, Inc.* v. *Commissioner*, 19 T.C. 1072, 1077 (1953), aff'd, 218 F.2d 639 (2d Cir. 1955):

> Any other result would make sport of the so-called fraud penalty. A taxpayer who had filed a fraudulent return would merely take his chances that the fraud would not be investigated or discovered, and then, if an investigation were made, would simply pay the tax which he owed anyhow and thereby nullify the fraud penalty. We think Congress has provided no such magic formula to avoid the civil consequences of fraud.

the limitations period while fraud remains uncorrected, *i.e.*, "to deny to the taxpayer the benefits of a statute of repose for that period during which he has failed to discharge his legal obligation." D. Br. 15. The Tenth Circuit in *Dowell*, reasoning similarly, characterized Section 6501(c)(1) as putting the three-year limitations period "in limbo" pending further taxpayer action. 614 F.2d at 1265-1266.

The statutory language, however, is contrary to petitioners' contention. Section 6501(c)(1) does not "suspend" the operation of Section 6501(a) until a fraudulent filer makes voluntary disclosure; the former section makes no reference at all to the latter, providing simply that the tax may be assessed "at any time." And Section 6501(a) contains no mechanism for "snapping back into play" when a fraudulent filer repents; by its terms, it does not apply to any case—such as a "case of a false or fraudulent return"—that is "otherwise provided" for in Section 6501. Where Congress has intended only a temporary suspension of the running of the limitations period, it has had no difficulty drafting statutory provisions that unambiguously accomplish this result. See, *e.g.*, I.R.C. § 6503(a)(1) ("The running of the period of limitations provided in section 6501 * * * shall (after the mailing of a [deficiency] notice * * *) be suspended for the period during which the Secretary is prohibited from making the assessment * * *").[11] Congress evinced no intent to accomplish that result here.

4. The weakness of petitioners' proposed statutory construction is further shown by its impact on Sec-

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[11] See also, *e.g.*, I.R.C. § 6503(a)(2), (b), (c) and (d), App., 3a-5a, *infra*. Section 6503 as a whole is entitled, "Suspension of [R]unning of [P]eriod of [L]imitation."

tion 6501(e)(1)(A). As noted above, that Section sets forth an extended limitations period in situations where a taxpayer's return nonfraudulently omits more than 25% of his gross income, permitting assessment in such cases "at any time within 6 years after the return was filed." This rule evidently reflects a congressional judgment that, in cases of substantial but nonfraudulent omissions of income, the Commissioner needs an assessment period longer than the three-year period provided for routine tax investigations, but shorter than the unlimited period provided for cases of fraud.

In *Dowell* and *Klemp*, the Commissioner had issued his deficiency notices more than three years after the amended returns were filed, but less than six years after the original returns were filed. Those courts nevertheless ruled the notices untimely, holding that *both* Section 6501(c)(1) *and* Section 6501(e)(1)(A) were inapplicable. 614 F.2d at 1267; 77 T.C. at 206. Accord, *Britton*, 532 F. Supp. at 278.[12] As the Tax Court majority put it (77 T.C. at 206):

> Section 6501(e) explicitly does not apply to situations covered by section 6501(c). * * * Accordingly, no period of limitations began running upon the filing of petitioners' [fraudulent] original return. The only period of limitations that ever became applicable * * * is the [three-year] period provided in section 6501(a) * * *.

The results produced by this reasoning—which Deleet seems to concede (D. Br. 41-43) flow neces-

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[12] Neither the Tax Court in No. 82-1453 nor the district court in No. 82-1509 was required to address the application of Section 6501(e)(1)(A) on the facts of the instant cases. In each case, the notice of deficiency was mailed more than six years after the original returns were filed.

sarily from petitioners' proposed statutory construction—are anomalous. Under the *Klemp* court's reasoning, a taxpayer who *fraudulently* omits 25% of his gross income can gain the benefit of the three-year limitations period by filing an amended return. Yet it is well established that a taxpayer who *innocently* omits 25% of his gross income cannot gain that benefit by filing an amended return; rather, he must live with the six-year period specified in Section 6501(e)(1)(A). *E.g.*, *Houston* v. *Commissioner*, 38 T.C. 486 (1962); *Goldring* v. *Commissioner*, 20 T.C. 79 (1953). As the court of appeals properly noted (B. Pet. App. 12a), there is no justification for "creat[ing] a situation in which persons who [commit] willful, deliberate fraud [are] in a better position" than those who understate their income inadvertently. The *Klemp* court's reasoning, moreover, entails no slight embarrassment to logic, for it assumes that Section 6501(c)(1) is both applicable (in that it is capable of ousting Section 6501(e)) and inapplicable (in that it is incapable of ousting Section 6501(a)) at the same time.

5. In sum, there is scarcely room for doubt that, if the language of the statute is to be accepted at face value, the filing of "a return [that is] fraudulent in any respect with intent to evade a tax * * * deprives the taxpayer of the bar of the statute for that year." *Lowy* v. *Commissioner*, 288 F.2d 517, 520 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962). Accord, Brennan, *The Uncertain Status of Amended Tax Returns*, 7 Rev. Tax'n Individuals 235, 252-264 (1983) (hereinafter *Amended Tax Returns*) (concluding that *Dowell* and *Klemp* were wrongly decided). Nothing in Section 6501(a) or in Section 6501(c)(1) can properly be construed to start the

running of the ordinary limitations period, or any other limitations period, when a taxpayer who has filed a false or fraudulent return makes disclosure, in an amended return or otherwise, of his true taxable income. Rather, as the Third Circuit held here and as the Fifth Circuit held in *Nesmith*, the plain and unambiguous language of Section 6501(c)(1) permits the Commissioner to assess "at any time" the tax for a year in which there has been filed "a false or fraudulent return," notwithstanding any subsequent disclosures the taxpayer might make.

B. A literal construction of the statute is supported by sound considerations of policy and practicality

1. Petitioners do not seriously dispute—indeed, petitioner Deleet explicitly concedes—that a literal reading of Section 6501(c)(1) justifies the court of appeals' holding as to the timeliness of the Commissioner's deficiency determinations. D. Br. 24; see B. Br. 27-29. Petitioners contend, rather, that a flexible, nonliteral reading should be accorded the statute on grounds of equity and tax policy. "Once a taxpayer has provided the information upon which the Government may make a knowledgeable assessment," in petitioners' view, "the justification for suspending the limitations period is no longer viable and must yield to the favored policy of limiting the Government's time to proceed against the taxpayer." D. Br. 12; see B. Br. 17. This was the explicit rationale underlying the decision of the Tenth Circuit in *Dowell* (614 F.2d at 1265) and the majority opinion of the Tax Court in *Klemp* (77 T.C. at 205-206). See also *Britton*, 532 F. Supp. at 278.

These are cases of statutory construction. The question presented here is not whether, as an abstract matter, the rule advocated by petitioners accords with "[c]ommon sense" or "good policy." Contra, *Britton*, 532 F. Supp. at 278; *Klemp*, 77 T.C. at 205. The question, rather, is whether the policy petitioners favor was the policy Congress adopted in enacting Section 6501. As indicated above, the language of that section unambiguously reveals Congress's intention that *no* limitations period is to apply with respect to the assessment of taxes "[i]n the case of a false or fraudulent return." This Court has repeatedly held that courts are not authorized to rewrite a statute because they deem its effects harsh or its operation susceptible of improvement. See *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *United States* v. *Calamaro*, 354 U.S. 351, 357 (1957); *Lewyt Corp.* v. *Commissioner*, 349 U.S. 237, 240 (1955); *United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232, 236 (1955). Especially is this so when the statute involved is a statute of limitations, which "must receive a strict construction in favor of the Government." *E.I. Dupont de Nemours & Co.*, 264 U.S. at 462.

In any event, contrary to petitioners' contentions, a literal reading of Section 6501(c)(1) is in fact supported by substantial considerations of tax policy. As the court of appeals held, there are "strong reasons" why Congress might conclude that the Commissioner should be entitled to the continued benefit of an unlimited assessment period, notwithstanding the filing of an amended return, where the taxpayer's original return was fraudulent. These considerations are not laid out in the legislative history of Section 6501, which is sparse (see p. 13 n.8, *supra*). Yet they

suffice to dispel any suggestion that the statutory scheme resulting from a literal construction of the section is erratic, irrational, or haphazard.

First, Congress surely recognized that fraud cases are ordinarily far more difficult to investigate than routine tax cases. This is so, in part, because the taxpayer's underlying records will frequently have been falsified or even destroyed.[13] In such circumstances, the filing of an amended return may not substantially diminish the amount of effort required to verify the correct tax liability.

Second, the arrival at an IRS Service Center of a document styled an "amended return" does not fundamentally change the nature of a tax fraud investigation. Amended returns, however accurate they may ultimately prove to be, come with no greater guarantee of trustworthiness than other submissions. A taxpayer suspected of having filed a fraudulent return may later give clues as to his true income, intentionally or inadvertently, in numerous ways—by cooperating with the examining agents, by filing an amended return, or by making admissions in court. Fraud may be disclosed by an informant's testimony, by the taxpayer's books, or by the books of those with whom the taxpayer has dealt. In each instance, the data supplied to the examining agent may or may not be accurate, may or may not be complete. A responsible examiner simply cannot accept the information furnished on an amended return—any more

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[13] The Internal Revenue Manual accordingly instructs examining agents that the "extensive documentation of adjustments required in a fraud case results in more detailed transcripts or extracts and more extended account verification than is required for the examination features in an ordinary case." 2 Internal Revenue Manual (Audit) (CCH) ¶ 4565.32 (3)(c) (1980).

than he can accept other information furnished by the taxpayer or third parties—as a substitute for a thorough investigation into the existence of fraud. There is no "tax policy" justification for holding that amended returns, of all the multifarious data that may bear on tax fraud, have the singular effect of shortening to three years the unlimited assessment period specified in Section 6501(c)(1).

Third, fraud cases differ from other civil tax cases in that the Commissioner has the burden of proof on the question of fraud. Whereas the Commissioner's notice of deficiency is generally entitled to a presumption of correctness, Section 7454(a) provides that, "[i]n any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary." An amended return, of course, may constitute an admission of substantial underpayment. But it will not ordinarily constitute an admission of fraud. As Judge Parker said in her dissenting opinion in *Klemp*, 77 T.C. at 212-213:

> When a taxpayer files a nonfraudulent amended return * * * [the Commissioner] will not necessarily have all of the facts he needs to prove by clear and convincing evidence a fraudulent intent to evade tax. Absent proof of that specific intent, evidence of an underpayment standing alone will not support the imposition of the fraud penalty. Thus, while 3 years may be an adequate period within which to assert the fraud penalty where the taxpayer's fraudulent intent is established in prior criminal proceedings or by stipulation, the 3 years may not be enough time for [the Commissioner] to prove fraudulent intent where a more extensive investigation is required.

Fourth, and most importantly, the difficulties that attend a civil fraud investigation are compounded where, as in *Badaracco*, the Commissioner's initial findings lead him to conclude that the case should be referred to the Justice Department for criminal prosecution.[14] The statute of limitations for prosecuting criminal tax fraud is generally six years. See I.R.C. § 6531. Once a criminal referral has been made, the Commissioner will often find it difficult, if not impossible, to complete his civil investigation within the normal three-year period, and the taxpayer's filing of an amended return will not make any difference in this respect.

This Court has recognized the Commissioner's dual responsibility when investigating tax fraud. *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). The Court there noted that "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." *Id.* at 309. Indeed, it is the very interrelationship of these elements which dictates that, once a case has been referred for criminal prosecution, the ordinary tools provided by Congress for investigating civil tax liability—principally, the summons power of Section 7602—become unavailable to the Commissioner. See 437 U.S. at 311-313.[15] Practically speaking, there-

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[14] As noted above (p. 5 n.5 *supra*), criminal prosecution was not recommended against petitioner Deleet, but was recommended against one of Deleet's officers. After that proceeding ended, the civil investigation of the company and its officers continued, culminating in the issuance of deficiency notices to them for additional tax and fraud penalties. See p. 5 n.6, *supra*.

[15] After *LaSalle* was decided, Congress amended Section 7602 to permit the issuance of a summons to investigate both

fore, the Commissioner is often forced to place civil audits in abeyance when criminal prosecutions begin.[16]

Apart from such practical considerations, it has generally been the policy of the Internal Revenue Service to give priority to criminal enforcement, and, whenever possible, to defer civil assessment and collection until related criminal proceedings have ended. See, *e.g.*, 1 Internal Revenue Manual (Administration) (CCH) ¶ 1218, at 1303-78 (1983) ("Experience has demonstrated that attempts to pursue both the criminal and civil aspects of a case concurrently may jeopardize the successful completion of the criminal case"); 2 Internal Revenue Manual (Audit) (CCH) ¶¶ 4565.32(2), 4565.42 (1981).[17] Given the

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civil and criminal tax matters, so long as no "Justice Department referral is in effect." Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 622. The amendment became effective September 3, 1982.

[16] It is no answer to assert, as does petitioner Deleet (D. Br. 37), that the Commissioner will have collected substantial evidence of fraud before referring a case, or that the government must prove the elements of the civil deficiency "in any criminal proceeding for tax evasion." Not all criminal prosecutions involve tax evasion charges under Section 7201; even when they do, the government need only establish that there was a substantial understatement of tax liability, not the precise amount thereof. See, *e.g.*, *United States* v. *Norris*, 205 F.2d 828, 829 (2d Cir. 1953). Moreover, in a criminal prosecution under Section 7206(1), the government need establish only that false statements were made under penalties of perjury as to a material matter. See *United States* v. *DiVarco*, 343 F. Supp. 101 (N.D. Ill. 1972), aff'd, 484 F.2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

[17] The Manual alerts IRS personnel to the following risks, among others, in pursuing parallel civil and criminal investigations: (1) possible premature disclosure of evidence to a defendant; (2) claims of harassment by potential criminal

potential for conflict between the Commissioner's criminal and civil enforcement responsibilities, this policy of deferral has been recognized as both "necessary and wise." *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). In exceptional cases, as where collection is in jeopardy, the government may be forced to proceed on the civil front and seek protective orders to prevent interference with the criminal prosecution. But, as the court below concluded (B. Pet. App. 13a), there is nothing to indicate that Congress intended, in all cases, to "force the Commissioner to decide to proceed with only civil or criminal remedies or to jeopardize both by going forward civilly and criminally at the same time." See also *Amended Tax Returns* 262-263.[18]

2. Petitioners do not seriously dispute that these policy considerations generally support a "plain language" reading of the statute. Yet they vigorously contend (B. Br. 33-34; D. Br. 35-36) that such considerations do not apply on the facts involved here. In their view, the Commissioner should have had no

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defendants; (3) seizure of funds in a civil case that might deny a defendant the criminal attorney of his choice; (4) difficulties with witnesses where the civil trial precedes the criminal trial; and (5) difficulties with the introduction of evidence in a civil case owing to taxpayers' assertion of Fifth Amendment rights.

[18] This Court's decision in *United States* v. *Baggot*, No. 81-1938 (June 30, 1983), may further complicate the Commissioner's expeditious completion of civil audits in fraud cases. The Court there held that grand jury materials may not be disclosed to the IRS for use in civil tax investigations. Thus, while a grand jury may have seen considerable evidence of tax fraud, that evidence will often be unavailable to examining agents as they attempt to complete their civil audits. Rather, the agents will be required to "pick up where they left off" before the case was referred to the Justice Department.

difficulty in issuing deficiency notices within three years after *their* amended returns were filed.

This assertion, even if correct,[19] is irrelevant to decision in these cases. These cases involve construction of a statute of limitations, not a question of laches.[20] The question presented is whether the Commissioner is entitled, as a matter of law, to rely on the unlimited assessment period of Section 6501(c)(1) in cases involving tax fraud. If the court of appeals was correct in its reading of the statute, it is immaterial whether the Commissioner could have acted more promptly in these particular cases.

3. Besides questioning the "tax policy" justification for an unlimited assessment period, petitioners urge that a literal reading of the statute produces inequitable results. In petitioners' view, it is unfair

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[19] On petitioners' reading of Section 6501, the statute of limitations as to Deleet would have expired on August 9, 1976—less than three months after judgment was entered in the criminal tax fraud proceeding against one of its officers. See p. 5 n.5, *supra*. Under the IRS policy of deferring civil audits until the termination of related criminal cases, it would have been extremely difficult for the Service to have finished Deleet's civil audit, prepared the notice of deficiency, and subjected the case to normal administrative review within this time. Indeed, Deleet to this date has not conceded that its original returns were fraudulent, although it is assumed for purposes of decision (see p. 4 n.4, *supra*) that they were. The statute of limitations as to the Badaraccos, on their theory, would have expired on August 17, 1974—slightly more than a year after the criminal case ended. The record does not reveal why the Commissioner's civil investigation was not concluded by that date, or whether it reasonably could have been so concluded.

[20] It is well established that the United States is not subject to the defense of laches. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940).

for the government "to forever suspend a Sword of Damocles over a taxpayer who at one time may have filed a fraudulent return, but who has subsequently recanted and filed an amended return [that is honest]." D. Br. 26; see B. Br. 16. The dissenting judge below (B. Pet. App. 19a) stressed similar considerations.

Even if equitable considerations were relevant in construing a statute of limitations, they would have little force here. A taxpayer who has filed a fraudulent return with the intent to evade tax is scarcely in a position to complain of the fairness of a rule that facilitates the government's collection of the tax due. Nor is a taxpayer who has been the subject of a tax fraud investigation likely to be caught by surprise when the notice of deficiency arrives, even if it does not arrive promptly after he files an amended return. And petitioners' fear that the government will abuse the unlimited assessment period is unrealistic, for it is scarcely in the Commissioner's interest to delay a deficiency notice unnecessarily. Such delay would only complicate his burden of proving fraud by "clear and convincing evidence," *Kreps* v. *Commissioner*, 351 F.2d 1 (2d Cir. 1965), and could well increase the risk that the tax will become uncollectible in whole or part.

Finally, it cannot reasonably be contended, as petitioner Deleet further argues (D. Br. 14, 44), that a literal reading of the statute "punishes" taxpayers who repentently file amended returns. To the contrary, such a reading leaves them in precisely the same position they were in before. It might be argued that Congress should provide incentives to taxpayers to disclose their fraud voluntarily. But Congress has not chosen to do so in Section 6501, perhaps reasoning that taxpayers already have an incentive

to make voluntary disclosure in the hope of avoiding or mitigating criminal liability. At all events, that legislative judgment is controlling here.

C. A nonliteral reading of the statute cannot be justified on the theory that fraudulent returns are "nullities"

In an effort to find some textual support for their suggested statutory construction, petitioners contend (B. Br. 21-27; D. Br. 32-34) that their original returns, to the extent they were fraudulent, were "nullities" for statute-of-limitations purposes. If the original return is a nullity, the argument runs, the amended return must necessarily be "the return" referred to in Section 6501(a). And if "the return" (as thus defined) is nonfraudulent, the argument concludes, Section 6501(c)(1) is inoperative, and the normal three-year limitations period applies. See *Dowell*, 614 F.2d at 1265.

This argument was properly rejected (B. Pet. App. 8a-9a) by the court of appeals. The notion that fraudulent returns are "nullities" is unsupportable. And it is absolutely clear that "the return" referred to in Section 6501(a) is the original, not the amended, return.

1. Petitioners do not and cannot contend that their fraudulent original returns were "non-returns" for purposes of the Code generally. The numerous Code provisions relating to civil and criminal penalties for submitting or assisting in the preparation of "false or fraudulent returns" make clear that a document which on its face plausibly purports to be in compliance, and which is signed by the taxpayer, is a "return" despite its inaccuracies.[21] Nor do petitioners

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[21] See, *e.g.*, I.R.C. § 7207 (criminal penalty for submission of a "return * * * known * * * to be fraudulent"); I.R.C. § 6531(3) (limitations period for criminal prosecution of per-

contend that their original returns were nullities for all purposes of Section 6501. Indeed, Section 6501 (c)(1) itself uses the phrase, "false or fraudulent return." If a fraudulent return is not a "return" for purposes of Section 6501(c)(1), the section is an oxymoron.

Petitioners contend, rather, that a fraudulent return is a nullity only for the limited purpose of applying Section 6501(a). See B. Br. 24; D. Br. 33-34. But the word "return" appears 64 times in Section 6501. Congress cannot rationally be thought to have given that word one meaning in Section 6501(a), and a totally different meaning in Section 6501(b) through (q).

Nor does this Court's decision in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934), support petitioners' argument that fraudulent returns are "nullities," whether for purposes of Section 6501(a) or for any other purpose. The Court there held that a taxpayer's original return, despite its inaccuracy,

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sons who aid in preparation of "a false or fraudulent return"); I.R.C. § 6653(b) (civil penalty where underpayment of tax "required to be shown on a return is due to fraud"). Difficult questions may arise as to whether a "return" has been filed in "tax protester" cases, where a document is submitted that on its face does not purport to furnish the information necessary to compute a tax liability. Compare, *e.g.*, *United States* v. *Stout*, 601 F.2d 325, 328 (7th Cir.), cert. denied, 444 U.S. 979 (1979) (blank Form 1040 accompanied by assertions of Fifth Amendment privilege is not a "return") and *United States* v. *Edelson*, 604 F.2d 232, 234 (3d Cir. 1979) (Form 1040 listing income in "constitutional dollars," *i.e.*, dollars backed by silver, is not a "return") with *United States* v. *Long*, 618 F.2d 74, 75-76 (9th Cir. 1980) (Form 1040 with zeros inserted in all available spaces is a "return"). The "tax protester" cases have no application here, for petitioners' original returns, while inaccurate, purported on their face to furnish information necessary to compute the tax.

was a "return" for limitations purposes, so that the taxpayer's filing of an amended return did not start a new limitations period running. The Court stated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such * * * and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180.

Here, the taxpayers' original returns similarly purported to be returns, were sworn to as such, and appeared on their face to constitute genuine endeavors to satisfy the law. And while petitioners' original returns were not, in fact, honest, one cannot infer from *Zellerbach* the answer to a question that was not before the Court in that case: whether a purported return that does *not* constitute an honest attempt to satisfy the law is, without more, "not a return." Indeed, elementary logic teaches that the contrapositive of a hypothesis is not necessarily true.[22]

2. The language and structure of the Code likewise refute petitioners' contention that a fraudulent filer's amended return becomes, in view of his origi-

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[22] The other decisions of this Court cited by petitioners on this point (B. Br. 22-26; D. Br. 13-15) are likewise inapposite. In *Florsheim Brothers Drygoods Co.* v. *United States*, 280 U.S. 453 (1930), the Court held that a "tentative return" did not start the running of the statute of limitations since it did not contain, and did not purport to contain, sufficient information to allow the Commissioner to compute and assess the tax. Here, by contrast, petitioners' returns on their face set forth an asserted basis for computing their tax, even though the information set forth was inaccurate. *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304 (1940), merely held that a submission containing the information necessary to compute the tax, but on the wrong form, constituted a "return" sufficient to start the running of the statute of limitations.

nal return's null status, "the return" for purposes of Section 6501(a). The Code itself neither requires the taxpayer's filing nor mandates the Commissioner's acceptance of amended returns.[23] As this Court pointed out in *Hillsboro National Bank* v. *Commissioner*, No. 81-485 (Mar. 7, 1983), slip op. 8 n.10, "it is settled that the acceptance of [an amended return] after the date for filing a return is not covered by statute but [is] within the discretion of the Commissioner." See, *e.g.*, *Koch* v. *Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977) (per curiam); *Miskovsky* v. *United States*, 414 F.2d 954, 955 & n.4 (3d Cir. 1969) (citing cases). To be sure, the Treasury Regulations do provide for the filing of amended returns in certain situations, and specific forms are furnished by the Internal Revenue Service for this purpose.[24]

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[23] As petitioner Deleet notes (D. Br. 21, 32 n.13), the Code in several places acknowledges the existence of amended returns. See, *e.g.*, I.R.C. § 6213(g)(1) (providing that "return" for purposes of assessing tax due upon correction of mathematical errors includes any return, statement, or list and "any amendment or supplement thereto * * *"); I.R.C. § 6103(b)(1) (providing that "return" for purposes of confidentiality and disclosure provisions includes "any amendment or supplement" to a return). But the Code nowhere requires or explicitly provides for a taxpayer's filing of amended returns.

[24] Treas. Reg. § 301.6402-3(a) provides that an amended return (in lieu of Form 843, entitled "Claim") may be filed where the taxpayer seeks a refund of tax erroneously paid. Conversely, if a taxpayer later ascertains that income was improperly omitted or a deduction improperly claimed in a prior taxable year, the Regulations provide that he "should" file an amended return and pay the additional tax due unless the statute of limitations has run. Treas. Reg. §§ 1.451-1(a), 1.461-1(a)(3)(i). These Regulations do not *require* the filing of amended returns.

But while an amended return may constitute *a* return for a taxable year, it does not follow that it therefore becomes "the return" for purposes of Section 6501(a). The Tax Court noted as early as 1924 that the use of the definite article in the predecessor of that section indicates Congress's intention that only one return—viz., the first return filed—would be of operative significance for any tax year. *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924). See also *Evans Cooperage, Inc.* v. *United States*, 712 F.2d 199, 204 (5th Cir. 1983) (rejecting argument that amended return should be regarded as "the return for the taxable year" for purposes of Section 6655(b)(1), governing penalty for failure to pay estimated tax).

In sum, nothing in the language of the statute, the structure of the Code, or the decided cases supports petitioners' contention that fraudulent returns are "nullities" for statute-of-limitations purposes. The reason that fraudulent returns lie outside the scope of Section 6501(a) is not that they are not "returns" within the meaning of that section. The reason, rather, is that they are "false or fraudulent returns" within the meaning of Section 6501(c)(1).

D. A nonliteral reading of the statute cannot be justified by the asserted need to avoid disparate treatment as between fraudulent filers and fraudulent non-filers

Petitioners contend (B. Br. 18-20; D. Br. 15-17, 26) that a literal reading of Section 6501(c) produces a "disparity in treatment" between taxpayers who, in the first instance, file a fraudulent return and those who, in the first instance, fraudulently fail to file any return at all. In petitioners' view (D. Br. 44), such a disparity unjustifiably "elevat[es] one form of tax fraud over another." This argument,

accepted by the Tenth Circuit in *Dowell* (614 F.2d at 1265-1266), was properly rejected by the court of appeals here (B. Pet. App. 9a-10a & n.6).

As noted above, Section 6501(c)(3) provides that, "[i]n the case of failure to file a return, the tax may be assessed * * * at any time." It is now settled that this section ceases to apply once a return has been filed for a particular year, regardless of whether that return is filed late and regardless of whether the taxpayer's failure to file a timely return in the first instance was due to fraud. See *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), acq., 1958-2 C.B. 3. Accord, Rev. Rul. 79-178, 1979-1 C.B. 435. Citing this principle, the *Dowell* court reasoned (614 F.2d at 1265-1266) that the filing of a nonfraudulent *amended* return, in the wake of a fraudulent original filing, is essentially analogous to the filing of a nonfraudulent *late* return, in the wake of a fraudulent failure to file. The Tenth Circuit accordingly concluded that Section 6501 should be read to produce the same statute-of-limitations result in each situation.

As the court of appeals in the present cases correctly noted, however, "Congress provided a clear indication" on the face of the statute that it *did* intend different statute-of-limitations results in these two situationts (B. Pet. App. 10a n.6). Congress's intention is evident in the language of both Section 6501(c) and Section 6501(a).

1. Section 6501(c)(3) applies "[i]n the case of failure to file a return." The section does not speak of failure to file a *timely* return,[25] nor does it speak

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[25] Compare I.R.C. § 6651(a)(1) (providing civil penalties for failure "to file any return * * * on the date prescribed therefor * * *"); I.R.C. § 7203 (providing criminal penalties for willful failure to make returns or furnish information "at the time or times required by law or regulations * * *").

of a *fraudulent* failure to file. Thus, it becomes literally inapplicable once a return has been submitted, regardless of whether the return is filed late, and regardless of whether the failure to file a timely return was due to fraud.

Section 6501(c)(1), by contrast, applies "[i]n the case of a false or fraudulent return." As noted above (pp. 13-14, *supra*), that section by its terms continues to apply indefinitely once a fraudulent return has been filed. The fact that a fraudulent filer subsequently submits an amended return, or otherwise cooperates in a civil or criminal investigation, does not make the case any less a "case of a false or fraudulent return." Accord, *Woolf* v. *United States*, 578 F.2d 1103, 1105 (5th Cir. 1978). In short, although Sections 6501(c)(1) and 6501(c)(3) are similar in some respects, they lead ineluctably to different results in the two situations posited by petitioners.[26]

2. If Section 6501(c) leaves any doubt whether Congress intended that different statute-of-limitations consequences should govern fraudulent and late-filed returns, that doubt is eliminated by Section 6501(a).

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[26] As petitioner Deleet notes (D. Br. 17-19), the provisions now set forth in Sections 6501(c)(1) and 6501(c)(3) were contained in a single subsection from 1921 until the 1954 recodification of the tax laws. See, *e.g.*, Internal Revenue Code of 1939, ch. 2, § 276(a), 53 Stat. 87 ("In the case of a false or fraudulent return with the intent to evade tax or of a failure to file a return the tax may be assessed * * * at any time"). The 1918 version of the statute did not mention failure to file returns; it provided an unlimited assessment period only in the case of false or fraudulent returns. Revenue Act of 1918, ch. 18, § 250(d), 40 Stat. 1083. Nothing in the legislative materials suggests that Congress intended the two provisions to operate in identical fashion. And the language Congress used clearly indicates that it did not.

That Section specifically provides that the normal three-year assessment period begins to run on the date "the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Section 6501(a) does not inquire into why a return was filed late; it applies whether the failure to file a timely return was innocent or negligent, excusable or fraudulent.

Here again, the language of the statute inescapably produces different results in the two situations posited by petitioners. Section 6501(a) on its face provides that the filing of a nonfraudulent *late* return will start the general three-year limitations period running.[27] The Section just as plainly contains nothing to suggest that the filing of a nonfraudulent *amended* return will have this effect.

3. As petitioner Deleet notes (D. Br. 35-40), cases of fraudulent failure to file give rise to some of the same investigatory and enforcement problems as do cases of fraudulent returns. Arguably, therefore, the "tax policy" considerations discussed above (see pp. 20-25, *supra*) would support giving the Commissioner an unlimited period of assessment in both situations, regardless of the taxpayer's subsequent efforts to set the record straight. For whatever reason, however,

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[27] The parenthetical phrase in Section 6501(a) (quoted above) was added in 1954; its predecessor provided simply that the tax "shall be assessed within three years after the return was filed." Internal Revenue Code of 1939, ch. 2, § 275(a), 53 Stat. 86. Courts construing the earlier version uniformly held that a late-filed return was "the return" for the taxable year, and that the normal limitations period began to run on the date such return was submitted. *E.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. 180, 186-187 (1957). The addition of the parenthetical phrase in 1954, therefore, merely restated the law.

Congress has chosen not to do so,[28] and has manifested that decision in unambiguous statutory language.

CONCLUSION

The judgment of the court of appeals should be affirmed in both No. 82-1453 and No. 82-1509.

Respectfully submitted.

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OCTOBER 1983

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[28] The point is not that Congress discretely afforded different limitations treatment to two arguably similar categories of fraudulent conduct. Congress simply did not distinguish, for limitations purposes, between fraudulent and nonfraudulent failures to file; rather, it placed all cases of "failure to file a return" in a single category under Section 6501(c)(3). In Section 6501(c)(1), by contrast, Congress explicitly and separately addressed the problem of fraudulent returns, providing that, where fraud is involved, the tax may be assessed "at any time."

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6501. Limitations on assessment and collection

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) Exceptions

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax

In the case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may

be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return

In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(e) Substantial omission of items

Except as otherwise provided in subsection (c)—

(1) Income taxes

In the cases of any tax imposed by subtitle A—

(A) General rule

If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. * * *

* * * * *

Section 6503. Suspension of running of period of limitation

(a) Issuance of statutory notice of deficiency

(1) General rule

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(2) Corporation joining in consolidated income tax return

If a notice under section 6212 (a) in respect of a deficiency in tax imposed by subtitle A for any taxable year is mailed to a corporation, the suspension of the running of the period of limitations pro-

vided in paragraph (1) of this subsection shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year.

(b) Assets of taxpayer in control or custody of court

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(c) Taxpayer outside United States

The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period during which the taxpayer is outside the United States if such period of absence is for a continuous period of at least 6 months. If the preceding sentence applies and at the time of the taxpayer's return to the United States the period of limitations on collection after assessment prescribed in section 6502 would expire before the expiration of 6 months from the date of his return, such period shall not expire before the expiration of such 6 months.

(d) Extensions of time for payment of estate tax

The running of the period of limitation for collection of any tax imposed by chapter 11 shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a)(2) or (b)(2) or under the provisions of section 6163 or 6166.

* * * * *

Section 6653. Failure to pay tax

* * * * *

(b) Fraud

If any part of any underpayment (as defined in subsection (c)), of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *

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Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., *et al.*, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

DELEET MERCHANDISING CORP., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER, DELEET MERCHANDISING CORP.

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Question Presented

Does the subsequent filing of a complete and honest amended return start the running of the statute of limitations provided in Section 6501(a) as Petitioner contends, or does the filing of an allegedly fraudulent return give the Government the right in perpetuity to assess deficiencies and penalties—no matter what remedial steps are taken by the taxpayer—as the Government contends?

TABLE OF CONTENTS

PAGE

Table of Authorities

Cases Cited

United States Constitution Cited

Statutes Cited

PAGE

Other Authorities Cited

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REPLY BRIEF FOR PETITIONER, DELEET MERCHANDISING CORP.

POINT I

Subsection 6501(c)(1) and Subsection 6501(c)(3) are in *pari materia*—both Subsections are *exceptions* to the three year statute of limitations of Subsection 6501(a) of the Code.

> "Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes."
>
> Benjamin Franklin[1]

Ben Franklin notwithstanding, the Government would have this Court hold that only death is a certainty. The Government submits that once a taxpayer has filed a false or fraudulent tax return it has the statutory authority to indefinitely suspend the assessment and collection of taxes even if that suspension extends beyond the life of the taxpayer[2]; and that neither the filing of a proper amended return nor any other act by the taxpayer, no matter what the circumstances, can place any time limitation on this asserted governmental prerogative to assess the tax on a date of its choosing. Congress certainly did not intend the result urged by the Government.

When Congress adopted the Revenue Act of 1918, it provided that:

> "Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made . . . In the case of false or fraudulent returns, the amount of tax due may be determined at any time after the re-

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[1] Benjamin Franklin in a letter to M. Leray—(1789) Bartlett's Familiar Quotations, 15th ed. (1980).

[2] See Petitioner's Br. p. 23.

> turn is filed, and the tax may be collected at any time after it becomes due." Revenue Act of 1918, ch. 18 § 250(d), 40 Stat. 1083.

It is clear from the express language of this statute that Congress intended to create an *exception* to its general statute of limitations in the case where fraudulent returns were filed. The use of the phrase "at any time" did not create an open ended statute of limitations but emphasized the fact that an *exception* was being made for a fraud case. By the Revenue Act of 1921, Congress extended the *exception* to the statute of limitations to encompass the situation where the taxpayer failed to file any return at all. Thus, the Revenue Act of 1921 provided:

> "[I]n the case of a false or fraudulent return with intent to evade tax, *or* of a failure to file a required return, the amount of tax due may be determined . . . at any time after it becomes due. . . ." (Emphasis added). Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265.

This Congressional legislation has remained without substantive change through the Internal Revenue Code of 1954 and the amendments thereto.

Although there is no legislative history which expressly sets forth the specific intent of Congress with respect to the enactment of the aforesaid provisions, Petitioner submits that when considered in conjunction with the accepted proposition that the American system of taxation depends primarily upon self-assessment by a taxpayer in informing the Government of his own tax liability (See, Mertens' Law of Federal Income Taxation, § 49.02), Congress' intent becomes quite apparent. Simply put, when the taxpayer files a "return", be it amended or original, which "evinces an honest and genuine attempt to satisfy the law" *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934), Congress initially mandated that the Gov-

ernment shall have five years in which to assess any tax due. Revenue Act of 1918, ch. 18, § 250(d). Congress has shortened that period to the present three year period of limitation of Subsection 6501(a) of the Code.[3] Thus, Congress expressly determined that when the taxpayer has given the Government complete information as to his income, deductions and credits, three years is ample time for the Government to make its determination as to any additional tax which may be due. Subsection 6501(a) of the Code. When the taxpayer fails to provide the Government with such information, then the three year limitation period imposed upon the Government does not begin to run.

The rationale for this distinction is apparent on its face. When the taxpayer files a false return, there is nothing about the return which sets it apart from the thousands of other tax returns which the Government receives which would lead the Government to believe that it is false and that the information contained therein is incomplete or erroneous. Therefore, when the taxpayer has not given the Government the complete and accurate information which the Government requires in order to determine the appropriate tax due, it would be unreasonable to subject the Government to any time constraints with respect to the assessment of additional taxes. Thus, Congress created and retained the exception to the general statute of limitations. Subsection 6501(c)(1) of the Code.

Likewise, in the case of a non-filer (particularly in 1921, before the advent of the computer age), the Government is also hampered, absent any tax return, in its ability to determine the amount of tax which may be owed. Consequently, in the case of a non-filer, as in the case of the filing of a fraudulent return, the Government is, by reason of the exception created by Congress, not subject to the general three year period of limitation. Subsection 6501 (c)(3) of the Code.

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[3] The term "Code", unless otherwise indicated, is a reference to the Internal Revenue Code of 1954, as amended.

In both instances, it is the acts of the taxpayer that have placed the Government at a substantial disadvantage with respect to the determination and imposition of taxes, and it is only reasonable that Congress should see fit to deprive that taxpayer of the benefits of the three year limitation period. On the other hand, when the taxpayer has supplied the Government with complete and proper information as to his income, deductions and credits, reason and logic dictate that the Government must now proceed in accordance with Congressional mandate and seek to assess and collect any tax due within three years of the date of its receipt of required information—whether such information is supplied either by way of an "amended return" or by a "delinquent return". In *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), acq., 1958-2 C.B. 3; Rev. Rul. 79-178, 1979-1 C.B. 435, the Tax Court, construing the provision of Subsection 6501(c)(3) of the Code, so held. In the words of the Court:

> "For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns." 30 T.C. at 123-13.

Petitioners submit that, if this Court accepts the view of both the Tenth and the Third Circuit Courts of Appeals that Subsection 6501(c)(1) and Subsection 6501(c)(3) are in *pari materia*, the Tax Court's holding in *Bennett*, although not binding precedent of this Court, should be viewed as dispositive of the issues. The Court in *Bennett* held that the three year statute of limitations set forth in Subsection 6501(a) is applicable in a case where a taxpayer fraudulently and with intent to evade the tax failed to file a tax return, and where after being the subject of a Government investigation the taxpayer subsequently filed a return. It is illogical and unreasonable to hold that a taxpayer who fraudulently fails to file a

return, and who subsequently files a proper return is entitled to the benefit of the three year statute of limitations, but a taxpayer who files a fraudulent return, and who subsequently files a proper amended return is not[4]. There can be no justification for favoring one errant taxpayer who has failed to meet his obligation over another, or for providing that the consequence of one form of noncompliance can be limited by supplying the Government with accurate information as to income, deductions and credits, while the consequences of a different failure to comply cannot be so limited.

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[4] After stating that is not relevant to the issue before this Court, the Government questions Petitioner's statement that the filing of its amended return was done "voluntarily and without any coercion from the Government whatsoever" (G. Br., p. 4 n. 4). It does so by reference to a clearly self-serving report prepared by an IRS agent in 1977 referring to events which occurred four years prior to the date of the report. Defendant's Answer to Plaintiff's First Set of Interrogatories, Ex 1, Appendix A p. 1a *et seq.* The portions of the report referred to by the Government relate to statements allegedly made by counsel for Petitioner at a meeting at which the author of the report was not present, nor is the source of the agent's knowledge disclosed. Not only is the report inaccurate but its probative value is questionable. It should be noted, however, that the report does show that Martin Windell—who was not an officer of the Petitioner at the time that the amended returns were filed—was the moving force behind the alleged acts of tax fraud (See Appendix A, p. 5a), and that the corporation and its other officers were at best guilty of negligence but not of criminal fraud (Appendix A, p. 5a). The report does make it clear that there was no Government investigation or other activities relating to affairs of the Petitioner prior to the time it filed its amended return (Appendix A, p. 2a). The Petitioner was not subject to "any coercion from the Government whatsoever" and as between the Petitioner and the Government, the filing of an amended tax return was clearly a "voluntary" act on the part of the Petitioner. (Although the report is referred to at length by the Government, it did not request its inclusion in the Joint Appendix nor see fit to include the document as part of the Appendix to its Brief. Petitioner has included the relevant portions thereof as Appendix A.)

In its Brief, the Government never squarely addresses the *Bennett* decision nor the implication of that decision on the issues presented herein. Rather, it erroneously contends that "[N]othing in the legislative materials suggests that Congress intended the two provisions to operate in identical fashion. And the language Congress used clearly indicates that it did not". (G. Br. 34, n. 26). This statement overlooks the fact that Congress in the 1921 Code, addressing itself for the first time to the question of failure to file, enacted the provision relating to failure to file within the same sentence as that dealing with the filing of a false return (Revenue Act of 1921, ch. 136 § 250(d), 42 Stat. 265). All subsequent enactments followed the same pattern until the 1954 Code, when the provisions were separated into two sentences in the same section of the Code. This change was made without substantive comment by Congress. Petitioner suggests that there can be no greater showing of Congress' intent that both subjects be dealt with in the same manner.

The *Bennett* decision and the Government's own Revenue Ruling (Rev. Rul. 79-178, 1979-1 C.B. 435) belie its present contention that fraudulent non-filers who subsequently file what the Government describes as "delinquent returns" do not receive preferential treatment above that afforded the taxpayer who files a fraudulent return and subsequently files a complete and accurate "amended return". The *Bennett* taxpayer was indisputedly engaged in the perpetration of tax fraud. He was not a taxpayer, as the Government's brief suggests, who innocently or negligently failed to file a return on its due date and subsequently voluntarily filed a "delinquent return". (G. Br. p. 35). The Government's Revenue Ruling which followed the holding in *Bennett* states that it was directed toward the following issue:

> "Can tax be assessed at any time under section 6501 (c)(1), (2) or (3) of the Internal Revenue Code in a case where the taxpayer did not timely file an income tax return in a ***willful attempt to evade*** income

> tax but, after an Internal Revenue Service investigation began, filed a correct, but delinquent, return?" (Emphasis added)

The Government concluded after some analysis that:

> "The tax cannot be assessed at any time under section 6501(c) of the Code, but must be assessed within the three-year period of limitations provided in section 6501(a) (June 1, 1979). 26 CFR 301.6501 (c)-1: Exceptions to general period of limitations on assessment and collection". Rev. Rul. 79-178, 1979-1C.B. 435.

Notwithstanding the foregoing, the Government, without providing any logical explanation or distinction, now urges a contrary holding with respect to a taxpayer who purportedly sought to evade the payment of taxes by filing a fraudulent return and who subsequently filed an accurate amended return. The Government in its Brief denies that its positions are inconsistent. But the mere stating of the Government's contention is to expose the illogical and unreasonable nature of that position. The Government's position is predicated not on the issue of taxpayer's "intent to defraud", but rather on the manner in which the taxpayer sought to carry out that intent. It is the Government's contention that if the taxpayer, who intends to defraud the Government, carries out his fraudulent intent by not filing a tax return, he is afforded the benefit of the statute of limitations, provided he files his return *at any time*. If, however, the taxpayer who intends to defraud the Government, carries out his fraudulent intent by filing a false return, he is never afforded the benefit of the statute of limitations, even if he voluntarily files a complete, accurate non-fraudulent amended return. Such a proposition is illogical and inconsistent with the rational statutory scheme enacted by Congress.

POINT II

The construction urged by the Government will invite abuse—preventing the taxpayer from contesting arbitrary disallowances by the Government.

This Court has stated that statutes of limitations are enacted in a sense of fairness to prevent claims from being suspended over a period of time "until evidence has been lost, memories have faded and witnesses have disappeared". *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965). The policy arguments urged by the Government run contrary to this generally accepted principle.

When, on August 9, 1973 the Petitioner herein filed its amended returns for the taxable years 1967 and 1968, it paid the tax due as reflected on the returns. These returns are conceded by the Government to be non-fraudulent amended returns. With respect to such returns, the Government, in addition to assessing a fraud penalty under Code Subsection 6653(b), also seeks to collect additional taxes based on the Government's resulting disallowance of certain deductions claimed by the Petitioner. (JA 71A; G. Br. 4; A. 5a). While the burden of proving that the initial returns filed in 1967 and 1968 were fraudulent may rest with the Government, once the amended returns were filed and the Government disallowed certain of the deductions claimed on these returns, the burden of proving the propriety of these deductions lies not with the Government but with the Petitioner. *Richard P. Rosenberg* v. *Commissioner*, (Dec. 32,417 (M)), 33 T.C.M. (CCH) 31 (1974), aff'd., 519 F.2d 1400 (4th Cir. 1975); *Mike M. and Helen Grancich* v. *Commissioner*, (Dec. 35,026 (M)), 37 T.C.M. (CCH) 424 (1978), aff'd., unpublished opinion 4-30-81 (9th Cir. 1981); *Thelma Blevins* v. *Commissioner*, (Dec. 21,157 (M)), 14 T.C.M. (CCH) 840 (1955), aff'd., 238 F.2d 621 (6th Cir. 1955). In December, 1979, the Government, having reviewed the complete and fully informative amended returns filed by the Petitioner in 1973, disallowed certain deductions which relate solely to the business operations of the Petitioner. It is now the Pe-

titioner's burden to establish and prove the propriety of those deductions. By reason of the Government's unjust delay in seeking to assess and collect additional taxes from Petitioner, Petitioner will be required, more than ten years after the filing of its amended returns, to present evidence (*which may now be lost*) and witnesses (*whose memories may have faded or have disappeared*) to verify business deductions and expenditures it made in 1967 and 1968.

To place the Petitioner in such a position is contrary to any concept of fairness and creates a fertile breeding ground for Government abuse. If this Court accepts the position urged by the Government that it is free to assess the tax "at any time", a taxpayer could be required to meet its burden of establishing the propriety of its business deductions not 10 years after the filing of an amended return, but, if the Government so chooses, 15 years, 20 years or even 30 years after the date on which the expenses were incurred.

The Government states that "Petitioner's fear that the Government will abuse the unlimited assessment penalty is unrealistic". (G. Br. 27). However, the record in this case demonstrates that Petitioner's fear of Government abuse is not unrealistic, but quite real. There is absolutely no justification for the Government to have waited over six years after Petitioner had filed its amended returns to have made its assessment.[5]

The substantial prejudice to the Petitioner as a result of the Government's inaction is obvious, and cannot be justified by any reference to some vague policy con-

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[5] Petitioner filed its amended return on August 9, 1973. The Government's internal report indicates that the Intelligence Division granted permission to the Civil Division to proceed civilly against the Petitioner in early 1975, even though it recommended criminal proceedings against a former officer of Petitioner, Mr. Martin Windell. Moreover, the report further indicates that the criminal investigation of this former officer was concluded by the IRS on July 26, 1976 (Appendix A, p. 6a).

sideration. Once a taxpayer has filed an amended return and has given the Government all of the information that the Government needs to assess the tax, by Congressional mandate the Government must take affirmative action within three years of the filing of that return. Subsection 6501(a) of the Code. To remove the time restraints which Congress placed on the Government in which it must move to assess the tax is not only unreasonable but is also highly prejudicial to the taxpayer and contrary to the general principles of statutes of limitations.

Were this Court to accept the proposition urged by the Government—that it has an open ended time frame in which to assess taxes and determine deficiencies—it would place a burden on a taxpayer that could not possibly be met. For unless the taxpayer can find some way of preserving evidence forever; freezing and maintaining the memories of those persons having knowledge of the relevant facts; and providing for the immortality of his accountants and others whose testimony would be vital to establishing the propriety of any business deductions he has claimed—such a task is impossible for any taxpayer—the taxpayer must concede any disallowance which the Government chooses to make. Therefore, granting the Government the power to delay the assessment of tax until it and it alone decides to act would also grant the Government the power to act with impunity with respect to the disallowance of any deduction claimed by the taxpayer.

The continuing passage of time diminishes the taxpayer's ability to dispute any disallowance made by the Government. Thus, the longer the Government delays in acting to assess the taxes it claims are due, the less the taxpayer, who bears the legal burden of proving his deduction, is able to sustain that burden! To place such power in the hands of the taxing authority gives it ability to pressure the taxpayer to settle all pending and collateral disputes, irrespective of the merits of the

taxpayer's opposition. This certainly cannot be an acceptable rule of law in a tax system based on the precepts of voluntary disclosure, fairness and the assertion and prosecution of viable defenses; nor does the bridling of this potential abuse of power restrain or undermine the efficacy of the federal tax system.

POINT III

The need to foster voluntary self-reporting and re-evaluation of tax returns outweighs the Government's policy arguments.

The Government contends that there are sound policy and practical considerations in the case of the filing of a fraudulent tax return which warrant its having an unlimited period of time in which to assess any additional tax, notwithstanding filing by the taxpayer of an amended tax return.

The first of these considerations set forth in the Government's Brief is that fraud cases are ordinarily more difficult to investigate than routine tax cases and that the filing of an "amended return" does not "substantially diminish the amount of effort required to verify the correct tax liability". (G. Br. 21). While recognizing the Government's contention that tax fraud cases may be more difficult to investigate, Petitioner submits that the filing of an "amended tax return" is of substantial value to the Government, for not only does the filing of an amended return aid the Government in proving its case of fraud, but it also lessens the number of hours necessary for the Government to verify the information provided. By comparing a correct and complete amended tax return with the original fraudulent return, the Government can easily focus on those areas of the taxpayer's activities in which a fraud has been perpetrated, thereby narrowing the scope of its investigation and

contracting the number of hours in investigative work required to gain the evidence the Government will need to meet its burden of proof.

Secondly, the Government contends that the filing of the amended return "does not fundamentally change the nature of a tax fraud investigation. Amended returns, however accurate they may ultimately prove to be, come with no greater guarantee of trustworthiness than other submissions". (G. Br. 21). If by this statement the Government implies that the filing of an "amended return" may of itself be of little value because it may be false and fraudulent, such a contention, even if true, is not germane to the issue before this Court. If the amended return proves to be false and fraudulent in any respect, then the exception to the statute of limitations (Code Subsection 6501(c)(1)) remains operative and the Government is not under any time restraint with respect to assessing any tax which may be due. It is only when the taxpayer has filed a non-fraudulent amended tax return that the three year statute of limitations begins to run. If the Government is suggesting that it needs more than three years to verify the correctness of the information set forth in the amended return, Petitioner submits that Congress has seen fit to deny the Government such a luxury. Congress has expressly limited the Government to a three year period in which to determine the accuracy and propriety of non-fraudulent tax returns and the assessment of the tax due thereunder. Code Subsection 6501(a). There can be no justification for the Government's claim that it needs more time to verify the information contained in an amended return than it needs to verify information contained in an original return. The verification procedure should be the same and both are subject to the Congressional mandate that the process be completed within three years of the filing of the return.

Another policy consideration which the Government alludes to in its brief is the fact that, unlike other civil tax cases, in a false filing case the burden of proof with re-

spect to the issue of fraud rests with the Government[6]. In this regard, the Government states that while the amended return "may constitute an admission of substantial underpayment, it will not ordinarily constitute an admission of fraud". (G. Br. p. 22). Armed with an admission by the taxpayer that it has substantially understated its income, the Government is certainly in a much better position of meeting its burden of proof on the question of fraud than it otherwise would have been in the absence of such an admission. Moreover, the Government's unsupported contention that "[O]nce a criminal referral has been made, the Commissioner will often find it difficult, if not impossible, to complete his civil investigation within the normal three-year period, and the taxpayer's filing of an amended return will not make any difference in this respect" (G. Br. p. 23) is simply unrealistic. This statement presupposes that the amended return has been filed at the time of or prior to the referral of the matter to the Criminal Division, which may or may not be the case. Further, it ignores the fact that prior to the referral to the Criminal Division the Government must have uncovered at least what it perceives to be a *prima facie* case of tax fraud so as to warrant such a referral. Moreover, at the time that the Government's Criminal Division seeks an indictment of the taxpayer based upon a charge of tax fraud the investigation must have progressed to the point that the Government honestly believes that it has sufficient evidence to establish the taxpayer's guilt "beyond a reasonable doubt". If this is not the case, the Criminal Division cannot proceed to seek an indictment of the taxpayer, for to do so would be contrary to the high standard of con-

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[6] The same burden of proof rests with the Government in a case of a fraudulent non-filing of a tax return. Yet the Government acquiesced in the decision of *Bennett* v. *Commissioner*, which held that the three year statute of limitations was applicable to a tax return filed subsequent to Government action. Petitioner submits that the Government's prior inconsistent position points up the frivolous nature of this alleged policy argument.

duct imposed upon the Government in cases of criminal prosecution. *Berger* v. *United States*, 295 U.S. 78 (1935). At such time as the Government seeks to indict the taxpayer, it undoubtedly will have completed its criminal investigation. Thus, the Government's claim that if it is required to assess civil tax liabilities within three years of the filing of the amended return it would not have ample time within which to discharge its responsibility to enforce the criminal tax laws, is totally without merit.

This fact is amply demonstrated by an examination of the underlying facts of the cases which have been cited to this Court as being relevant to these issues herein. In *Dowell, Britton, Nesmith,* and *Badaracco,* the Government had more than sufficient time between filing of the amended return and the running of the three year statute of limitations in which to complete its criminal investigation and file its civil Notice of Deficiency[7]. However, it did not choose to act with dispatch.

	Amended Return Filed	*Indictment*	*Statutory Notice of Deficiency Issued*
[7] *Deleet* v. *United States*	8/09/73	NONE*	12/14/79
Badaracco v. *Commissioner*	8/17/71	11/71	12/21/77
Dowell v. *Commissioner* 614 F. 2d 1263, 1264 (10th Cir. 1980)	11/25/68	5/07/70	12/11/74

(*Table continued on following page*)

* Martin Windell, a former officer of Deleet, who had left the company several years prior to the filing by Deleet of the amended returns on 8/9/73, was the subject of a criminal proceeding. The investigation of Mr. Windell's affairs was completed by the IRS on 7/26/76 (Appendix A, p. 6a) and all criminal proceedings were completed in May of 1976. (G. Br., p. 5, n.5).

Petitioner submits that the alleged risks which the Government claims it might incur in pursuing a parallel civil and criminal investigation, as outlined in the Internal Revenue Manual (G. Br. 24), if they in fact exist, are not of such magnitude as to justify the position urged by the Government with respect to the imposition of tax liability. These risks as set forth in the Government's Brief are as follows: (1) possible premature disclosure of evidence to a defendant; (2) claims of harassment by potential criminal defendants; (3) seizure of funds in a civil case that might deny a defendant the criminal attorney of his choice; (4) difficulties with witnesses where the civil trial precedes the criminal trial; and (5) difficulties with the introduction of evidence in a civil case owing to taxpayers' assertion of Fifth Amendment rights.

(1) The Petitioner submits that the possible premature disclosure of evidence to a defendant is no justification for allowing the Government to have an open-ended period in which to proceed civilly with respect to the imposition of civil tax liability. The prejudice to the taxpayer by such a policy clearly outweighs any concern the Government might have with respect to disclosure of evidence. This is particularly true since the Government has the ability to seek protection of the courts

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(Footnote continued from preceding page)

	Amended Return Filed	*Indictment*	*Statutory Notice of Deficiency Issued*
Britton v. *United States* 532 F. Supp. 275, 276 (D. Vt. 1981)	2/06/76	3/15/78	3/19/79
Nesmith v. *Commissioner* 699 F. 2d 712 (1983)	12/73	Criminal Investigation Commenced 1973	12/01/78

to prevent such premature disclosure. *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962).

(2) The claim that parallel investigations might harass potential criminal defendants is unrealistic. Whether the investigation is being conducted on the criminal or civil side neither adds to nor decreases the likelihood of harassment of potential defendants. Moreover, if the Government conducts its investigation in accordance with accepted modes of conduct, there is no danger of it harassing potential parties.

(3) A concern that the seizure of funds in a civil case may deny a criminal defendant an attorney of its choice is easily resolved by the Government's own action. The Government is not obligated, when it files a civil tax deficiency notice, to seize the taxpayer's funds and, if this were truly a concern, the Government can easily proceed on an *ad hoc* basis and exercise restraint when appropriate. To use such an argument to support an open-ended statute of limitations is completely inappropriate.

(4) The concern the Government voices with respect to its difficulty with witnesses in situations where civil cases precede criminal cases may be a real one. But, a taxpayer's and/or a defendant's entitlement to an early resolution of any claim brought against him by the Government, whether that claim is lodged on either the civil or criminal docket, certainly outweighs this concern.

(5) Lastly, the Government claims the difficulty that it may encounter in a civil prosecution where the taxpayer has asserted the Fifth Amendment privilege. Since in a civil case, the Government is entitled to the benefit of a most favorable inference by reason of the taxpayer's assertion of the Fifth Amendment privilege (*Baxter* v. *Palmigiano*, 425 U.S. 308 (1976); *Winterland Concessions Co.* v. *Sileo*, 528 F.Supp. 1201 (N.D. Ill. 1981); *Poplar Grove Pltg. & Ref.* v. *Bache Halsey Stuart Inc.*,

465 F.Supp. 585 (M.D. La.), cause remanded, 600 F.2d 1189 (5th Cir. 1979), it is not prejudiced by assertion of a constitutionally protected right. The Government cannot honestly aver that the possible assertion of that privilege justifies its claim of need to permit an open-ended period of time to assert civil claims against a taxpayer, irrespective of the filing of an amended return.

As an additional policy consideration, the Government refers to Subsection 6501(e)(1)(A) of the Code, contending that a person who filed an alleged fraudulent return and subsequently files a corrected amended return should not be placed in a better position than the taxpayer who made substantial but non-fraudulent omissions on his original return. In making this argument, the Government does not address itself to the distinctions raised by Petitioner in its initial brief. (See, Petitioner Br., p. 41, *et seq.*) Essentially, the Government never addresses the proposition that unlike Code Subsection 6501(c)(1), Subsection 6501(e)(1)(A) is not an exception to the general three year statute of limitations contained in Subsection 6501(a) but is rather a self-contained substituted six year statute of limitations, having no relationship to either Subsection 6501(a) or 6501(c). *Klemp* v. *Commissioner*, 77 T.C. 201, 206. Thus, Petitioner submits that the decisions in *Goldring* v. *Commissioner*, 20 T.C. 79 (1953) and *Houston* v. *Commissioner*, 38 T.C. 486 (1962) are not inconsistent with the interpretation of Subsections 6501(c)(1) and (c)(3) which Petitioner puts forth. *Goldring* and *Houston* stand for the proposition that the filing of an amended return does not "relate back" to the original return so as to shorten the Congressionally enacted limitations period of Subsection 6501(e)(1)(A). Petitioner, accepting the proposition that the filing of an amended return would not shorten any limitation period with respect to Subsection 6501(c), submits that the filing of the amended return starts the limitation period enacted by Congress in Subsection 6501(a), to wit, a three-year statute.

The Government's contention that persons who file an allegedly fraudulent return will be placed in a "better" position than those who made substantial but non-fraudulent omissions on their returns ignores the realities of the situation. Extremely drastic penalties may be visited upon a taxpayer who files a fraudulent return or fraudulently fails to file. This is not the case with respect to a Subsection 6501(e)(1)(A) taxpayer. As already noted, the taxpayer who omits 25% of income from his return does have the benefit of a statute of limitations which begins to run the day his return is filed. The taxpayer whose return is subject to Subsection 6501(c)(1) receives no such benefit. It is only when such a taxpayer files an honest and complete amended return that he is to receive the limited benefit of that three year period of limitation provided for in Subsection 6501(a). Moreover, the filing of the amended return does not insulate the taxpayer from the possibility of criminal prosecution nor does it protect the taxpayer from the imposition of the 50% civil fraud penalty. Indeed, the very act of filing amended returns has probably heightened such possibilities.

In sum, the Government's alleged policy considerations are without substance. Furthermore, they must yield to a more basic overriding consideration—the United States tax system is dependent upon *voluntary self-assessment* by its taxpayers and relies on the good faith of each taxpayer to disclose honestly all information relevant to his tax liabilities. *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975); *Lucia* v. *United States*, 474 F. 2d 565 (5th Cir. 1973). Thus, no policy should be enunciated which deters self-assessment or which punishes a taxpayer, who, like the Petitioner, reexamines his prior act and comes forth and discloses by way of an amended return the information relevant to his tax liability. Neither should a policy be enunciated which places a premium on silence—do not file an amended return, elect to gamble on non-detection—for nothing is to be gained and much is to be lost by the admissions made by way of filing of an amended return.

Congress has adequately provided the most severe sanctions to penalize those taxpayers who initially disregard their duty of self-assessment. Criminal penalties and the 50% civil fraud penalty are adequate to protect the Government's interests. There is no need to assent to the Government's desire to impose penalty upon penalty and condemn the taxpayer to eternal purgatory, where no act of penitence can end the fires of uncertainty, and the Government, unbridled and unrestrained, can dictate the taxpayer's day of judgment. Certainly, such a result cannot be said to have been intended by Congress.

CONCLUSION

Petitioner submits that for the reasons hereinabove stated the filing of an honest amended tax return commences the running of the statute of limitations provided in Subsection 6501(a). Therefore, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner should be reinstated and affirmed.

Respectfully submitted,

BARRY I. FREDERICKS
Attorney for Petitioner in Docket No. 82-1509

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Of Counsel

[APPENDIX FOLLOWS]

APPENDIX A

Report Transmittal

Total Hours:

264

Name and address of taxpayer:

Deleet Merchandising Corp.
26 Blanchard Street
Newark, N.J. 07105

Related cases or key case:

Graphic Enterprises, Inc.
William and Beatrice Abrams
Martin Windell
Elliot and Evelyn Liroff
Joseph and Barbara Durfel
Richard and Harriet Liroff
Harvey and Minna Kramer

Return form No.:

1120

Years or periods:

1966 to 1972 Inclusive

Agreement:

None

Other information (Unagreed issues and important information not covered in workpapers or report):

Appendix A

The Intelligence Division initiated an investigation of the above taxpayers, when an attorney, Barry Fredericks appeared at the U.S. Attorney's Office, Newark, N.J. and in the presence of Chief John O'Hara and Group Manager, Charles Rapa of the Intelligence Division, he made the following admissions on 1/30/73:

(1) The taxpayers and clients listed above had been skimming receipts and funds for years.

(2) He was making what he felt was a voluntary disclosure and was in the processing of preparing and filing amended returns.

The Intelligence Division advised him that the I.R.S. no longer had a voluntary disclosure policy, that all information furnished would have to be investigated and finally they could not guarantee that his clients would escape prosecution. Mr. Fredericks further stated that one of the individuals not identified at this time had attempted to "shake down" or extort $350,000 from the other 5 individuals and threatened that unless his demands were met that he would "blow the whistle" on the others to the IRS about their flagrant evasion scheme.

Examining Officer:

Charles Lazarus—11/02

Date:

1/12/77

Approved by (Signature of reviewer):

Thomas Pienno, 2/14/77

• • •

Appendix A

On 2/13/73, Fredericks called the Intelligence Division to notify them that he had filed some corporate returns and that the name of the individual whom he identified as the extortionist was Martin Windell.

* * *

Fredericks made numerous allegations about Martin Windell such as the motivation for his alleged extortion, namely to finance his drug habits, high life style, expenses of being a paramor etc. He stated that the Corporations had opened diversionary bank accounts where unreported corporate receipts were deposited and where funds were disbursed to all of the officers. The accountant stated that amended returns were being prepared for all of the entities involved.

* * *

Audit uncovered that amended returns were filed on 2/12/73 with the following adjustments to taxable income:

Debit Commissions Expense—paid to officers.

Credit Gross Receipts for the same amounts.

In effect the first amended return did not increase or decrease taxable income. Examination further disclosed that re-amended corporate returns were filed on 8/9/73, which basically resulted in the following adjustments to taxable income:

Accounts Receivable and Accounts Payable were debited or credited and

Profit and loss items such as gross receipts and purchases were either debited or credited.

Appendix A

Thus, the taxable income of the years 1966 to 1971 inclusive which culminated with the filing of amended and re-amended returns increased or decreased taxable income as disclosed on the Forms 1120.

• • •

R. Mirsky CPA had replaced F. Geller CPA as the co-representative with B. Fredericks. Audit uncovered the following specific issues:

1. Commissions expense—deducted on all of the amended returns. Examination showed that payments were made to the officers in the various years as follows:

a. Checks disbursed directly from the diversionary, secret unrecorded bank accounts.

b. Proceeds of corporate customers' notes collected and deposited in officers' personal checking accounts. These amounts were reported as gross receipts on the amended returns.

c. Personal checks issued by the officers to one another allocating the fruits of some of the unreported income.

The taxpayer claimed through their representatives that the amounts of commissions distributed to the various officers were determined by a complicated formula consisting of 7 pages. No evidence was submitted to substantiate that this formula was in existence back in 1966.

• • •

Appendix A

The representative would not agree to the fraud penalty for the following reasons:

1. Martin Windell's involvement was separate and distinct from the other individuals and corporations. He was guilty of fraud while their clients were guilty of negligence at best.

2. They feel that their clients made a true voluntary disclosure for both civil and criminal purposes.

3. They would agree to the negligence penalty on open years.

• • •

Deleet Merchandising Corp. Years 1966 to 1972 inclusive

The following additional items were adjusted in the years 1970 to 1972 inclusive. The representative stated verbally that although he agreed with these adjustments, he would not sign a partial agreement in order to expedite the closing of the entire case:

(1) Travel and entertainment—1970 to 1972 inclusive. Cash items totalling about $30,000 each year were only substantiated to the amounts listed on unsworn statements on Deleet letterheads.

(2) Purchases—1970 to 1972 inclusive. Purchases included payments to employees which actually represented nondeductible loans which were never repaid. This account also included capital items which were expensed erroneously.

(3) Building repairs—1970 to 1972 inclusive. Audit uncovered also additional capital items which

had been deducted and is being adjusted accordingly.

(4) Gross receipts—1970 only. Examination of one of the diversionary bank accounts Chase Manhattan showed deposits not reported on either the original amended or re-amended returns.

Examination of the years 1966 to 1969 were confined to the fraud issuer, namely civil fraud penalty and commissions deducted determined to be non-deductible corporate distributions taxable as dividends to the recipient officer stockholders.

Inventories did not fluctuate over the years and were accepted as reported on the returns. Submission of the case for civil closing was delayed for numerous reasons as follows:

(1) Permission was granted by Intelligence Division to proceed civilly early in 1975 even though they had recommended criminal prosecution against Martin Windell.

(2) Fraud referral was rejected by Intelligence Division on 10/2/75. Immediately thereafter, permission was requested from Assistant Regional Council, Criminal Tax Philadelphia to proceed civilly against Deleet even though issues discussed would relate to the criminal items against Martin Windell. In their memorandum dated 1/15/76, they requested that civil closing be suspended temporarily.

(3) The closing memorandum on Martin Windell was returned to the Audit Division on or about 7/26/76. The case was returned shortly thereafter by the Review Staff to this examiner.

Appendix A

It is to be noted that a certified transcript has been secured as of 10/11/76 and that for the purposes of this report the taxpayer was only allowed amounts assessed even though amended returns were filed which increased the tax liabilities reported on the various returns.

No. 82-1509-CFX
Status: GRANTED

Title: Deleet Merchandising Corp., Petitioner
v.
United States

Docketed:
March 11, 1983

Court: United States Court of Appeals
for the Third Circuit

Vide:
82-1453

Counsel for petitioner: Fredericks, Barry I.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 11 1983	G	Petition for writ of certiorari filed.
2	Apr 18 1983		Brief of respondent United States in support of petition filed. VIDED.
3	Apr 20 1983		DISTRIBUTED. May 12, 1983
4	Apr 27 1983		Petitioners letter in compliance with Rule 28.1 filed.
5	May 16 1983		Petition GRANTED. The case is consoliated with 82-1453 and a total of one hour is allotted for oral argument.
			**********
7	Jun 16 1983		Order extending time to file brief of petitioner on the merits until July 30, 1983.
8	Aug 1 1983		Order further extending time to file brief of petitioner on the merits until August 1, 1983.
9	Aug 2 1983		Brief of petitioner Deleet Merchandising Corp. filed. VIDED.
10	Aug 2 1983		Joint appendix filed. VIDED.
12	Aug 17 1983		Order extending time to file brief of respondent on the merits until October 2, 1983.
13	Aug 19 1983		Record filed.
14	Aug 19 1983		Certified original record, two volumes, received from Tax Court.
15	Aug 22 1983		Record filed.
16	Aug 22 1983		Certified copy of C. A. proceedings received.
17	Aug 29 1983		Record filed.
18	Aug 29 1983		Certified original record received.
19	Oct 4 1983		Brief of respondent United States filed. VIDED.
20	Oct 14 1983		CIRCULATED.
21	Oct 24 1983		SET FOR ARGUMENT. Monday, November 28, 1983. (4th case) This case is consolidated with No. 82-1453. (1 hour)
22	Nov 2 1983	D	Motion of petitioners in No. 82-1453 for leave to file motion for divided argument, out-of-time, filed.
24	Nov 14 1983		Motion of petitioners in No. 82-1453 for leave to file motion for divided argument, out-of-time, DENIED.
25	Nov 19 1983	X	Reply brief of petitioner Deleet Merchandising Corp. filed. VIDED.
26	Nov 28 1983		ARGUED.